United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

CHAMBERS OF JUDGE BAZELON

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Transcript Excerpts

In the

United States Court of Appeals
for the
District of Columbia Circuit

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No. 14,422

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PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner*

vs.

FEDERAL POWER COMMISSION, *Respondent*.

SIERRA PACIFIC POWER COMPANY, *Intervener*.

ON PETITION TO REVIEW ORDER OF FEDERAL POWER COMMISSION

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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[Opening remarks of Presiding Examiner]: The Public Utilities Commission of California, the Public Service Commission of Nevada and Sierra were invited to comment upon the proposed increase. The California Commission stated that Pacific had filed a similar application with it and refused comment at this time.

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Presiding Examiner: Thank you, sir.

Now, may we have a[n opening] statement from Mr. Chanler for the Sierra Company?

Mr. Chanler: As I believe you know, sir, the Sierra Company objected to this proceeding, and this procedure before the Commission, on the ground that this is not a situation in which a public utility may avail itself of the ordinary rate-making process under 205 of the Federal Power Act to increase its rates by a mere showing that the new rates are reasonable, which is what they tell us they propose to do.

We contended that in this situation it was first necessary for the Pacific Company to show that its existing contract, which includes many things besides the rate, was unreasonable and should be set aside. Our reason is this: In 1945, the Pacific Company, confronted by the threat of competition of both Diesel power and from Government power, appeared before the California Public Utilities Commission—

Mr. Searls: Mr. Examiner—

Presiding Examiner: I suggest, counsel, that you allow

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Mr. Chanler to complete his opening statement without interruption. After that you may reply later, sir.

* * * * * * *

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Thank you.

Presiding Examiner: * * * Now, I interrupted you. Did you have something you think should be said in response to Mr. Chanler?

Mr. Searls: Mr. Examiner, I wanted to interrupt because I felt that Mr. Chanler was merely rearguing a petition which the Commission denied last week. I should say this: We do not expect that the evidence will support all of Mr. Chanler's statements. I would like to make this correction too: The name of the applicant company here is the Pacific Gas and Electric Company, not the California-Pacific Company.

Mr. Chanler: Thank you.

Mr. Searls: In a case such as this we often hear the epithet repudiation, but this is strictly a case for the regulatory powers of the Federal Power Commission, and it is

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our position and belief that when circumstances justify a general increase in a company's rates, that each of the customers may be required to bear a portion of that burden, and that no one may escape simply because it could be continued at the old rate because its portion of the business is small enough so that it would not seriously affect the company as a whole. We do not believe that the evidence will support the contentions that the schedule, FPC No. 3, was non-compensatory at the time that it was established. We do not believe that the evidence will support the contention that Schedule FPC No. 3 was established to meet a competitive situation. And if it becomes necessary, we expect to introduce evidence to show that Sierra Pacific made this contract with the Pacific Gas and Electric Company because it was the only source of power which was practical under the circumstances.

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Mr. Wahrenbrock: I am sorry to arise again, but if I understand Mr. Chanler's opening statement, as I recall, I did not understand that he proposed to put on any evidence that the rate increase as it is proposed to be increased will

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be unjust or unreasonable, or unduly discriminatory or preferential. May I ask if I understood correctly?

Mr. Chanler: I think it will develop that the new rate, if permitted, will be discriminatory as between Sierra Pacific and some 20 municipalities in California which have similar contracts, but which, being within California, cannot apply to this Commission and have been excluded from an increase by the California Commission. So there will be discrimination there, and I expect that will appear in evidence. Our primary contention is that the increase, speaking in the words of 205 now, proceeding under that, is unlawful. They have no right to seek an increase.

Presiding Examiner: Because they are unreasonable?

Mr. Chanler: Because they are bound by a binding contract.

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Mr. Chanler: We are standing here squarely on our contract rights, and the only respect in which the question of rates entered into it at all is to show that the existing rates —and I think it is conceded in their exhibits—the existing rates more than meet operating costs for this service. That is the only respect in which I believe that the question of rates enters into this hearing at all, under our theory of the law.

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Mr. Searls: We will ask that the proposed exhibit entitled "Contracts between Pacific Gas and Electric Company and Sierra Pacific Power Company and its predecessors" be marked as Exhibit No. 5.

Presiding Examiner: That will be identified as Exhibit 5.

(The document above referred to was marked as Exhibit No. 5, for identification.)

Presiding Examiner: This document embraces several contracts, does it not?

Mr. Searls: Yes, it does. I can give the dates of those if you wish.

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Presiding Examiner: I suggest that you do it at this point.

Mr. Searls: Exhibit No. 5 for identification contains a contract between Pacific Gas and Electric Company and the Truckee River General Electric Company dated November 18, 1922.

Presiding Examiner: That company is a predecessor of Sierra Pacific Power Company?

Mr. Searls: It is either a predecessor or the same company under a different name.

Presiding Examiner: All right.

Mr. Searls: I believe the Company has changed its name several times.

Presiding Examiner: Very well, the next one.

Mr. Searls: The next contract in that exhibit is a contract between Pacific Gas and Electric Company and the Truckee River Power Company, and that contract is dated March 23, 1923.

Presiding Examiner: All right. Next?

Mr. Searls: That contract, I would state, constitutes Pacific Gas and Electric Company's FPC Rate No. 1.

The next contract in Exhibit No. 5 is between Pacific Gas and Electric Company and Sierra Pacific Power Company and it is dated June 6, 1938, and that contract constitutes Pacific Gas and Electric Company's rate FPC No. 2. The last contract contained in Exhibit No. 5 is between Pacific

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Gas and // Electric Company and Sierra Pacific Power Company and is dated March 4, 1948, and it constitutes FPC Rate No. 3 of Pacific Gas and Electric Company.

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Q. [By Mr. Searls] Turning now to the third page [of Exhibit 8] which is headed Schedule P-31: Was that schedule in effect for service by the company at the time the contract of March 4, 1948 with the Sierra Pacific Power Company, which has been filed with the Federal Power Commission as FPC No. 3 was executed? A. [By Mr. Pollard] Yes, it was.

Presiding Examiner: Was it in effect at all times during the negotiations leading up to the making of that contract?

The Witness: Yes, sir, it was.

By Mr. Searls: I would like to ask you to compare this Schedule P-31 with the original schedule of charges in FPC No. 3. Will you refer to Exhibit No. 1? A. Yes, I have it here.

Q. Turn to page 3 of the contract in that exhibit. You will find in paragraph 4 several subdivisions. A. Yes, sir.

Q. I would like to ask you to compare first the demand charge in FPC No. 3 which appears on that page with the demand charge in Schedule P-31 contained in Exhibit 8.

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A. The demand charge is exactly the same when // computed in a similar manner to my earlier testimony this morning of another schedule of like form. I can go through the computations—I don't have them here—but Schedule P-31 provides for the first [50] kilowatts or less at $75, the next 150 at $1.50 per kilowatt per month—and I won't read those because it is in the exhibit here—and when computed for the first 2,000 kilowatts and reduced by 15 percent as provided under special condition "B" for voltage at higher than 25,000, it would result in this $1,338.75 which appears as the demand charge on page 3 of FPC tariff No. 3.

Likewise, if we reduce the mills per kilowatt hour—

Q. Let's keep it in cents, Mr. Pollard. A. The schedule is stated in mills in this case.

Q. Excuse me.

Presiding Examiner: Go ahead.

A. Schedule P-31 provides for the first 150 kilowatt hours per kilowatt per month at 7 mills per kilowatt hour.

By Mr. Searls: Q. Wait a minute. I don't think we had finished with the maximum demand, Mr. Pollard. You explained the comparison on the first 2,000 kilowatts of maximum demand. How about the provisions for excess demand

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over 2,000 kilowatts per month? // A. In Schedule P-31 it is 40 cents, subject to the 15 percent discount which makes it equivalent to 34 cents mentioned in the FPC tariff.

Presiding Examiner: Just a minute. You said 34 cents mentioned in the FPC tariff? The Witness: Yes. 34 cents is the rate.

Presiding Examiner: In the FPC tariff? The Witness: Yes (indicating). Page 3.

Presiding Examiner: FPC No. 3, yes. The Witness: That is right.

By Mr. Searls: Q. Now in FPC No. 3 there is a provision for standby charge. Is that the same amount as that provided in Supplement No. 1 to FPC No. 3? A. It is, and it is based on the same reasoning.

Q. Is there any provision corresponding to that standby charge in Schedule P-31? A. No, sir, except that P-31 applies where the entire service is rendered by Pacific Gas and Electric Company, which is not the case here.

Q. So that under P-31 there would be no standby service furnished because the consumer would have no generating facilities of its own? A. That is true.

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Q. Now will you compare the energy charges in // these two schedules. A. Similarly to the other P-31 that we talked about this morning, the first 150 kilowatt hours per kilowatt in this P-31 is 7 mills per kilowatt hour and is subject, under special condition (B) is subject to a discount of 3 percent. Excuse me. That is under Rate (b) I would like to correct what I said about special condition. It is under Rate (b) which is for delivery over 25,000 volts.

Presiding Examiner: On Schedule P-31? The Witness: Yes, that is right.

By Mr. Searls: Q. Perhaps we could correct that most easily by asking you where the discount appears in Schedule P-31? A. It appears under the caption Rate (B).

Q. And that discount applies to the energy charge as how much? A. It is 3 percent applied to 7 mills, becomes the 6.79 mills stated in the FPC tariff for the first 150 kilowatt hours per kilowatt per month. Likewise the 5 mills with the discount becomes 4.85.

Q. Where is the 5 mills? A. On P-31. —becomes 4.85 mills on the FPC tariff. 4 mills on Schedule P-31 becomes 3.88 mills on the FPC tariff for that block of energy.

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Q. Will you continue? A. While it is not provided for in Schedule P-31 there is a discount for delivery in the FPC tariff of more than 8 million kilowatt hours per month, which is a discount of .485 mills per kilowatt hour in the contract.

Q. How about the minimum charge which appears in the FPC tariff No. 3? A. There is a minimum charge there of $1 per kilowatt of maximum demand per month.

Q. Is there a corresponding provision in Schedule P-31? A. Special Condition (b) in P-31 provides the maximum demand in any month will be the average—excuse me. That is not a minimum charge, that is a demand provision. No, there is no minimum in P-31 that I can find.

Presiding Examiner: Are you going to leave those two pages now, Mr. Searls? Mr. Searls: Yes, sir, I am.

Presiding Examiner: I want to ask a question and see if I understand it. Look at Schedule P-31, Mr. Pollard. The Witness: Yes, sir.

Presiding Examiner: "Energy Charged (to be added to the demand charge)." Does that when computed have any

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effect upon the amount $1338.75 which you gave as the computed demand charge for kilowatts up to 2,000? The Witness: It is for the first 2,000 kilowatts.

Presiding Examiner: All right. The Witness: You say does the energy charge have any effect on the demand charge?

Presiding Examiner: Yes. The Witness: It is added to the demand charge.

Presiding Examiner: Then what effect does it have upon $1338.75? The Witness: It has no effect on that figure.

Presiding Examiner: Simply because that is in excess of 2,000 kilowatts? The Witness: No. The excess over 2,000 is 34 cents per kilowatt per month, but that is not an energy charge, that is a demand charge for the excess over 2,000. The energy charge on FPC No. 3 is the third paragraph below that.

Presiding Examiner: Now will you tell me in a nutshell what advantage Sierra Pacific got by its new contract which is filed as FPC Rate Schedule No. 3 over your schedule, Pacific Gas and Electric Schedule P-31, which you say was in effect for resale of power at the time you made the contract with Sierra? The Witness: The only difference lies

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in the standby // charge. You see in the case of Sierra Pacific they have to have standby for their own generation. P-31 doesn't contemplate any generation by the customer.

Presiding Examiner: When you say that is the only difference, do you really mean that? The Witness: Well, there is also this difference of the—

Presiding Examiner: I am talking about dollars and cents, you understand. The Witness: Yes, I understand what you mean. There is this difference of .485 mills per kilowatt hour for deliveries in excess of 8 million kilowatt hours per month which is in the Schedule P-31 as it was in 1945.

Presiding Examiner: All right, Mr. Searls. The Witness: May I make a slight correction in my previous testimony. I think I was asked whether the Schedule P-31 in effect in 1945 was exactly the same as it was in 1948 when we made the contract and I believe that P-31 was amended within that period so as to provide for this discount of .485 mills per kilowatt hour for over 8 million at that time, so that when the contract was made I think it was exactly the same as the filed schedule in effect at that time.

I think I said before that P-31 of 1945 was in effect but I think that change was made in the meantime.

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Mr. Searls: I think, Mr. Examiner, we had better try to straighten out this confusion about Schedules P-31 and we will endeavor to supply, if we may at a later date, a copy of the Schedule P-31 as it was actually in effect in March of 1948. I think the witness is correct as far as my own knowledge is concerned—that is, that Schedule P-31 in March 1948 did have a discount for deliveries in excess of 8 million kilowatt hours, identical with that provided to Sierra Pacific Power Company.

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Q. [By Mr. Chanler] The second contract of that Exhibit is the 1923 contract? A. [By Mr. Pollard] Are you asking me?

Q. Yes. A. Yes, it is.

Q. Will you look at the last page of that contract? You will find Schedule P-6 right after the signature page of that contract. A. Yes, sir.

Q. You will note that that became effective on February

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20, 1923. // A. That is right.

Q. Refreshing your recollection from that: there was a form of Schedule P-6 in existence in 1923 and the 1923 contract was made in accordance with that rate, was it not? A. Yes, sir.

Q. It was a contract for a term of years—10 years?

A. Ten years, with the right to renew for five years.

Q. And it was renewed for five years, was it not? A. Yes.

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By Mr. Chanler: Q. I believe you told, Mr. Pollard, one of the reasons advanced for this low rate [P-31] was that it would enable Pacific Gas & Electric Company to keep certain business, the loss of which was threatened by competition? A. That is true.

Q. And the threat of competition came, did it not, at that time, partly from the threat of the use of diesel plants and partly from government power that was being offered competitively in some of the areas? A. Yes, sir.

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Mr. Searls: Mr. Examiner, may I read one sentence which Mr. Chanler skipped over in his first excerpt?

Presiding Examiner: What page?

Mr. Searls: Page 62.

Presiding Examiner: Of Exhibit 10?

Mr. Searls: Of Exhibit 10, at the bottom of the page. Mr. Beckett also said:

> "While filing at this time is made to meet a particular situation, that is, the threatened loss of business which the company has long served, it is not out of line with the general policy which has been followed in rate making of this company and which may be regarded as anticipating, for this particular group, what probably would be done at some later date anyway."

My point here, Mr. Examiner, is that if we are to discuss the matter here I would like to make clear that our position is that Schedule P-31 was adopted to meet a particular competitive situation.

Presiding Examiner: Yes.

Proceed, Mr. Chanler.

Mr. Chanler: My position, to keep the record clear, is

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that that is exactly the same situation which confronted them when they made the contract with Sierra and I shall now attempt to demonstrate that.

Presiding Examiner: All right.

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Q. [By Mr. Chanler] As a result of these various discussions among your own engineers and with Mr. Tracy, there was made a formal suggestion by Mr. Fisher on January 22 [1947] in the letter on pages 20 and 21 [of Exhibit 11], in which he suggests that a third circuit be constructed for 110 kv operation, and he suggests that P.G.&E. construct it as far as Summit and Sierra Pacific construct it beyond Summit at 110 kv, is that right? A. [By Mr. Pollard] Yes, sir.

Q. Then he goes on— A. Let me modify that answer by saying that in addition, he also suggests the alternate possibility of another 60 kv. circuit.

Q. That is right. A. So that that was not the firm proposal on 110.

Q. After proposing the 110 kv. he writes as follows, does he not: "As a condition of our making this additional installation, we will want a new long-term contract for, say, 15 years beyond January 1, 1949 at substantially the same rates as those described in your present contract." That is the 1938 contract, is it not, Mr. Pollard? A. Where are you reading from?

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Q. The top of page 21. Page 21 at the lower right // hand corner of the exhibit. A. I find it now. I thought you turned over to another exhibit.

Q. I am sorry. A. What was the question about that paragraph you just read?

Q. I read the first sentence and said that as a "condition of making the additional installation they would want a long-term contract for, say 15 years at substantially the same rates as those described in our present contract." A. That was a suggestion, yes.

Q. And that means the rates of the 1938 contract?

A. That is right.

Q. And this morning I think we figured that was a little higher than P-6? A. Including the standby charge, yes.

Q. Including the standby? A. Yes.

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Q. [By Mr. Chanler] That is the contract that was ultimately executed* on March 4, 1948 and is in evidence as a part of Exhibit No. 1 and is known here as FPC rate schedule No. 3? A. [By Mr. Pollard] Yes.

Q. That contract, I think you testified yesterday, provides for service at rates that are substantially P-31 rates, isn't that right? A. Yes, with the addition of the standby charge.

Q. With the addition of the standby charge? A. Yes.

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By Mr. Chanler: Q. I will put it this way: Isn't it a fact that there were conferences during October and November —mostly in October of 1947—at which representatives of Sierra refused to enter into a 15-year contract at existing rates with a fuel escalator clause, stating that they were under pressure from people in Nevada to accept federal power, and that they could not enter into an agreement with you unless your rates were reduced to some comparable rate comparable to that which they could obtain from the federal bureau? Is that not so and were you not present at such conferences?

---

*Transcript has "excluded" here, obviously a transcription error.

Mr. Searls: I would object to that question on the [307] ground that that has nothing to do with the reasons why the Pacific Gas & Electric Company took any position in this matter.

Presiding Examiner: Objection is overruled. Answer the question, please. A. [By Mr. Pollard] There were a number of conferences. I was not present at all of them. I think Mr. Sutherland on one occasion went to Reno and had a conference with Mr. Tracy and his associates when I was not present, so that I can't answer your question. I will say, however, that Schedule P-31 which is a general schedule, has no escalator clause and Schedule P-31 was incorporated in this contract ultimately.

By Mr. Chanler: Q. Schedule P-31 was never incorporated in this contract as a schedule. A. That is right, but the rates and charges in the contract are identical with the Schedule P-31 rates and charges, with the exception of the standby charge.

Q. Standby charges? A. Yes.

Q. And the 15-year term? A. That is right. There is no 15-year term prescribed in P-31: it is a 5-year term. May I explain the 15-year term by saying that that was a condition [308] to // protect us in the very large investment we had to make at that time in making additional power available over the 110 kv line.

Q. You insisted if you made that investment you would have to have a 15-year contract, is that right? A. That was the consideration, yes, sir.

Q. And although on January 22, you wanted the same rates, you finally reduced the rates to P-31 rates, isn't that right? A. When you talk about January 22 you are talking about a very preliminary letter that was written by Mr. Fisher to Mr. Tracy and in all such negotiations both sides start out asking for a lot of things that ultimately, when they come to a meeting of the minds, there is give and take on both sides, and that is the whole basis of that point that I think, if I understand you, you are trying to make.

Q. It is a fact, is it not, that at the time PG&E entered into this contract at these rates, it was for the same reason stated to the Commission before—in order to hold the business? A. Not against competition, no.

Q. It was not? A. No.

Presiding Examiner: Are you talking about Sierra's

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contract, FPC Rate Schedule 3?

Mr. Chanler: Yes, sir.

Presiding Examiner: All right. Proceed.

By Mr. Chanler: Q. You say there was no threat of competition at that time? A. No serious threat, no, sir.

* * * * * * *

Q. And they stated that they thought Sierra Pacific should get cheaper power from the federal power bureau,

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didn't they? // A. They said they thought they should get cheaper power, yes.

Q. And they said particularly through the Colorado River Commission, didn't they, from the Federal Bureau of Reclamation? A. They may have referred to that.

Q. That was not discussed between you and Mr. Tracy and your representatives and Sierra's representatives as one of the situations that might develop? A. As I remember the discussions, it was about to this effect: that there had been some talk about Colorado River Power which might be transmitted by delivering it from Boulder Dam to the Southern California Edison Company and from the Southern California Edison Company to the Pacific Gas & Electric Company and ultimately to a line to be built by Sierra Pacific.

There was also some discussion of the possibility of securing power from Shasta Dam from the Bureau of Reclamation, but in that event the stickler was that it was not feasible nor economical to build the line from Shasta clear over into Nevada to deliver that power and while there were other possibilities mentioned in the course of our negotiations, our proposal was the most feasible and therefore was accepted by Sierra Pacific. In a nutshell that is my opinion of the basis of this contract.

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Q. [By Mr. Chanler] So while the [1938] contract still had seven years to run you entered into these negotiations, whereby in part to carry out your agreement and in part, I think you have said at other times, to hold the business?

A. [By Mr. Pollard] No.

Q. You haven't A. I didn't say that.

Q. All right. A. You tried to get me to say that and I didn't do it.

Q. For whatever reason—we will bring that out later—

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you reduced your rates from the P-6 rates in // the 1938 contract although it still, at the time the new contract was entered into, had five years to run to the lower P-31 rate?

A. Under entirely different circumstances.

Q. And you say that the threat of competition from the Bureau had nothing to do with it whatever? A. Yes, I said that.

Q. You do say that? A. Yes.

Q. Mr. Pollard, do you recall that during the spring and summer of 1946, important people in the government and in public life in Nevada—chambers of commerce, state engineers, and others—were attempting to persuade Sierra to enter into a contract to purchase all their power from them at the postage stamp rates stating that if they got such a contract from Sierra they then could accept the proposal from the Bureau to sell power from the Bureau to the Colorado River Commission. Do you know that?

Mr. Searls: I object on the ground that the matters to which counsel refers are clearly immaterial to this contract.

Presiding Examiner: It all goes to the question of his denial that federal power was involved. Do you know the last recitation he made?

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The Witness: No. I was not present at any of those meetings.

Presiding Examiner: You never heard of it in the papers or otherwise?

The Witness: Yes. I saw accounts in the papers of meetings in Nevada with the Colorado River Power Commission and other interested parties, but I am satisfied that we were satisfied that it just wasn't practical for the Bureau to deliver power to Nevada on account of the difficulty of transmission, and it was not a consideration of Bureau competition that made us make this contract.

By Mr. Chanler: Q. Do you recall, Mr. Pollard, that the interest in this proposal that I have just outlined to you, that you say you did read and hear about, was so great that the legislature of the State of Colorado amended the statute establishing the Colorado River Commission so as to enable it to purchase power from the Bureau for this purpose?

A. They may.

Mr. Searls: Do you mean State of Colorado?

By Mr. Chanler: Q. State of Nevada amended the statute establishing the Colorado River Commission so as to give it power and authority to enter into a contract with the

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Bureau of // Reclamation for this precise purpose? A. I have no direct knowledge of that. I believe they did pass some such statute but I had no knowledge of it.

Q. You heard of it at the time, didn't you? A. I heard that they passed the statute.

Q. You heard those rumors of pressure to use that power, didn't you? A. That is right.

Q. But you now state that that had nothing whatever to do in inducing Pacific Gas & Electric to reduce its rates from P-6 to P-31? A. That is my opinion, because, as I stated, I think we were satisfied that even under the statute that you referred to and all this other pressure, it wasn't practical to deliver Shasta power to Nevada on account of the cost and the delay in time.

Q. If it wasn't practical in your judgment for Sierra to get power from anywhere else, why did you reduce your rate? A. Because we had in the meantime established P-31 as a resale rate and we had offered it not only to customers under competitive conditions but to all of our resale customers who could qualify.

Q. Are you saying that you ever offered it yourselves?

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A. Yes.

Q. Isn't it a fact that Sierra demanded it? A. I don't know about whether they demanded it or not but we did offer P-31 because it was a resale rate that was on file as one of our regular rate schedules, and it fit this customer's requirements and we gave it to them on that basis. They may have also urged us to give it to them. I won't say they didn't.

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By Mr. Chanler: Q. Now turning to Page 12 of Exhibit 12, Mr. Pollard, you there testified [at the 1948 hearings on the contract before the California Commission], did you not, as follows: "Now what were some of the reasons for us entering into the agreement of March 4, 1948?

> "Answer: Of course, the primary reason was that the load of the Sierra Pacific Power Company has grown to the point where it is very little less than the total combined capacity of the two 60 k.v. lines and the anticipated future growth is—I mean anticipation as to future growth is that it will continue to increase rapidly and by October, 1949, without an additional transmission line, it will not be possible to supply the entire load, and the purpose of entering into it was to give better service to the Sierra Pacific Company and to retain its business."

You so testified, did you not? A. I so testified.

Q. That one of the purposes was to retain its business, was it not? A. Yes.

Presiding Examiner: You so testified. That is the question.

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That is right. // The Witness: Yes, I did.

By Mr. Chanler: Q. And that is one of the reasons, was it not? A. That is what I said.

Q. Do you say it now? A. Yes, I might add: Not, however, for the purpose of meeting competition but because we wanted to have the load, wanted to serve our customer well and retain his load.

Q. Just what does the word "retain" the business mean to you? A. Keep it on our line.

Q. Does it mean otherwise you would lose it? A. Keep it on our lines.

Q. In order to make sure that you don't lose it, isn't that right? A. Yes.

Q. Lower down on that same page you were asked: "What was the reason for making the contract effective for a 15-year term after the date that the new proposed transmission line is placed into service?" Will you state now in your own words what was the reason for that? A. I said: "Well, of course, that was—on our part was in order to guarantee that we would have business for a long enough period of

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time to warrant us in making the // investment in the cost of the new line and amortizing it. And, furthermore, followed the same pattern as previous contracts we have had in each of which instances a substantial investment was made for service of this customer. And, similarly, 15-year contracts were taken at each of those times for that reason."

* * * * * * *

Q. But you say now that you did not agree to that reduction [to the P-31 rate for the 1948 contract] because of the fear of any competition or of losing the business to another supplier? A. Yes, I do say that, and as I explained, we had in the meantime adopted a new resale rate the equivalent

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of // which we made available to Sierra Pacific, plus the 30,000 standby charge which differentiated its loads from those of others served directly just under the terms of P-31.

Q. But you obtained approval of that rate in 1945, did you not? A. Yes.

Q. 2½ years before this? A. Yes.

Q. There had been no change of any kind since January 22 of 1947 when Mr. Fisher said that you would require a 15-year contract at the same rates plus an oil escalator clause in order to build a new line, was there? A. I think it would be repetitious, but I will repeat that in the case of the 1938 contract we continued—I mean that the load had gone to a point where we had to spend more money and that is the reason we had to make a new contract at this time before the old contract by its specified terms had expired, and it was in connection with the additional investment that we made this proposal, with the 15-year contract, and as I explained before, what Mr. Fisher said in his first letter on these negotiations was the starting point for a trade.

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Q. [By Mr. Wahrenbrock] Yes. So that under the terms of this [1938] contract, Pacific complied with its obligation to build the second 60 kv line, but that wasn't sufficient to enable it to sell Sierra Pacific all the power Sierra Pacific in 1945 was going to need? A. [By Mr. Pollard] 1948.

Q. In 1948 was going to need? A. That is right.

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Q. So it is your position that because of that change in factual circumstance it was necessary to alter the contract?

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A. It was necessary to extend it for at least a 15-year period beyond that date.

Q. To alter it, to begin with? A. Yes.

Presiding Examiner: Because of additional investment by Pacific Gas? The Witness: That is correct.

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Q. [By Mr. Chanler] Do you still deny, in the light of what you have just read, that one of the reasons for entering into this contract was to meet competition under similar conditions?

Presiding Examiner: You mean the Sierra contract?

Mr. Chanler: Yes, the Sierra contract. A. [By Mr. Pollard] Yes, I do so deny because it wasn't under similar conditions, because the Sierra point of delivery was not within twelve miles of Shasta Dam and the source of power from the government and in my opinion then and in my opinion now it was not practical to deliver power from Shasta Dam to Sierra Pacific so in that respect it was not similar to the Redding contract.

Presiding Examiner: Because of the what? The Witness: Because of the ease of delivery of government power to Redding and the impossibility of practical delivery by the government to Sierra.

Presiding Examiner: Why impossible to deliver to Sierra? The Witness: Because it was such a long distance and the cost of the transmission line, even at government

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rates, would // have cost Sierra more than the cost of power under our contract.

Presiding Examiner: Weren't the transmission lines in being? The Witness: No.

By Mr. Chanler: Q. Mr. Pollard, I think you stated—you have said several times—that because Redding was only 12 miles from Shasta, Redding's contract was 5 percent below P-31. Now, I am not contending, and nobody is suggesting, that the Sierra contract is 5 percent below P-31, and I ask you again: Do you now state that Mr. Moulton was not stating the fact when he told the California Commission [in the 1949 proceeding] that the reason for adding Sierra [to those customers which P.G.&E. asked to be excluded from the 6% rate increase] was that the contract was negotiated under conditions much the same as those which existed in the case of the Redding contract and those other contracts which I have described? A. What was your question?

Q. Do you say he was not telling the truth? A. No, I don't say he was not telling the truth. There were similar conditions, but competition was not one of them.

Q. Let's go back and see what conditions Mr. Moulton is referring to. Will you go back to Page 40 [of Exhibit 14]? At the bottom of Page 40, Mr. Moulton says, does he not, in

answer // to a question:

> "Yes, I will have to describe those customers either individually or by groups as the systems differ."

Then he lists them. I don't want to go into too many of them. Will you begin reading at the top of Page 41, "The company sells electric energy." I think I will have to ask you to read that.

> A. "The company sells electric energy for resale to the Cities of Alameda, Biggs, Gridley, Healdsburg,

Lodi, Lompoc, Palo Alto, Redding, Santa Clara and Ukiah and to the Plumas-Sierra Rural Electric Cooperative under new five-year contracts which were negotiated during the last six months of 1949. The Plumas-Sierra contract, which is listed in Exhibit K as being then under negotiation, has since been executed and approved by the Rural Electrification Administrator and delivered to us. The contract so delivered is dated October 26, 1949, although we received it perhaps two weeks ago."

Q. Go right ahead. I believe I am going to have to ask you to read what he said.

A. "Question: Pardon me, Mr. Moulton. Is it a fact that that contract is now pending before this Commission in connection with a formal application for

authorization to carry it out?

"Answer: It is. Of the group of contracts I have described the first to be signed was that with the City of Redding. That contract was offered to the city in order to avoid the loss of Redding as one of Pacific's electric resale customers. At about the same time the company offered the contract which was subsequently accepted the Bureau of Reclamation offered a form of power contract. The Redding City Council, following a consideration of the two proferred contracts called a special election and submitted to the voters the proposition of from what source the city should purchase electric energy for resale. At the election on June 28, 1949, a majority voted in favor of purchase from Pacific. A contract was then executed, subject to the approval of this Commission, which then authorized it in Decision 43,147. The opinion in that decision stated in part: 'We need not repeat here the references to prior decisions in proceedings which involved the right of a utility to reduce its rates in order to meet

> competition. A clear statement of the Commission's position was given in Decision No. 38,305 (46 C.R.C. 120).' The company, following the approval of the Redding contract, likewise offered new five-year contracts to the other cities named and to the Plumas-
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>
> Sierra Co-op in order to insure retention of them as electric resale customers. This Commission approved each of the city contracts and, as I have stated, application requesting approval of the Plumas-Sierra contract is now before the Commission. The language in the several decisions approving the city contracts is substantially the same in each of them as to the reasons for approval. Because of the competitive conditions under which these contracts were negotiated"—

Presiding Examiner: You have read the other.

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By Mr. Chanler: Q. Now I ask you again: When Mr. Moulton said that the Sierra contract was entered into—"was negotiated under conditions much the same as those which existed in the case of the Redding contract and those other contracts which I have described" do you agree that he was referring to the conditions which you have just been reading? A. Not all of them, no.

Q. Not all of them. What other conditions? A. The Sierra Pacific didn't have any election at which the people voted and there were many other things that are mentioned there as a reason for differentiating these contracts, which do not apply to Sierra Pacific, and I still maintain that the Sierra Pacific contract was made because of the fact that is was the resale contract on file for public service to resale companies.

Q. Is there any reason given for entering into these contracts, in the testimony of Mr. Moulton which you have just read, which deals with anything except competition—the necessity of getting the low rates to meet competition? Is any other reason given? A. Yes, I think so. The Redding election was one difference.

Q. The Redding election was an election of which—

Presiding Examiner: Let him give them. You have asked him for them. Then you can tear it apart if you want to.

Mr. Searls: Perhaps we could clarify this by having the witness take up each of these cities and stating whether there was actually competition with respect to those cities listed. A. Would you please give me the page at which I started reading?

By Mr. Chanler: Q. I think it was page 41. At the top of page 41. A. There has never been any competition in connection with Alameda. I think there was an offer of a contract by the Bureau to Biggs. There was one to Goodley.* There was never any competitive condition as to Healdsburg. There was a contract offered to Lodi—in fact Lodi signed the contract and later the Bureau was unable to carry out its terms and it was canceled. There was never a competitive condition in regard to Lompoc. There was no offer to Palo Alto. Redding there was.

There was no offer to Santa Clara nor to Ukiah. In fact, Healdsburg, Ukiah and Lompoc are not in the area under which our so-called wheeling contract would apply. There

was no way that the Bureau could deliver power to // those.

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*Should read "Gridley".

So that there are only a few of these cities that are mentioned in this list where there was any actual competition.

By Mr. Chanler: Q. Is there any reason given for giving them the low rate in the five-year contract by Mr. Moulton other than that it was to meet competition, whether it was by election or by offer of another contract? That is the question I am asking you. A. I am looking at Mr. Moulton's testimony to see if I can find such. He said—the lines are blurred here—at the ninth line on page 42: "The company following the approval of the Redding contract likewise offered new five-year contracts to the other cities named and to the Plumas-Sierra Co-op in order to insure retention of them as electric resale customers," but—I am inserting my words now—but not on a competitive basis.

By Mr. Chanler: Q. You mean that you offer low rates to retain business even though there is no possibility of losing the business, is that your proposition? A. It might be, yes.

Q. Seriously? A. No immediate chance of competition.

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These // cities, several of them, as I pointed out, were not even subject to Bureau contracts, they couldn't have had Bureau power.

Q. Then why did Mr. Moulton tell the California Commission that the reason he wanted to exclude them from this increase was that they had given these low rate contracts to meet competition? A. Because it was the company's policy at that time to treat all of these cities in the same way and when they gave a special contract to Alameda they offered it to all of the other resale customers, city customers, municipality customers, and Plumas-Sierra and the Sierra Pacific, because in fairness those customers would have felt aggrieved that because of competition in one case we gave a special rate and we didn't give it to all customers of the like class.

Q. So that the statement of Mr. Moulton given here under oath: "Because of competitive conditions under which these contracts were negotiated, which reasons were recognized by the Commission in authorizing them, we believe that the contracts with all those cities and with the Plumas-Sierra Corporation, should be exempted from the requested increase", was not entirely a truthful statement then, was it?

Mr. Searls: Mr. Chanler, I submit that Mr. Moulton

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didn't say anywhere in here that each of the cities did involve a competitive situation.

Mr. Chanler: I think I have just read it.

Presiding Examiner: I don't see, counsel, that you are making much headway. The testimony of Mr. Moulton is here, we have the testimony of Mr. Pollard on the stand, and he has made his qualifications, and you have repeated many times now, trying to get him to change it. I don't think you are making headway and I think you should abandon it.

Mr. Chanler: I will turn to something else.

Presiding Examiner: Very well.

Mr. Chanler: I don't think I will abandon it. The contention I make, I think, is sustained by the evidence.

Presiding Examiner: When you get down to the end, though, it is a question of what was the situation with regard to Sierra and not Redding, Alameda, and Lodi.

By Mr. Chanler: Q. Now, Mr. Pollard, could you turn to Exhibit 15, page 541? A. I have it.

Q. Beginning at the top of the page, the fourth line, page 541.

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Presiding Examiner: The question and the answer. // Is that what you want?

Mr. Chanler: I would like the question and then the answer.

Presiding Examiner: One at a time.

> A. "Question. Just exactly as applied to that particular company, what justification is there for asking that the 6 percent, or whatever you may be allowed in this proceeding, should be accepted in that contract?"

Mr. Chanler: May I interrupt for a moment? I want to state on the previous page that they are talking about Redding. I didn't want to clutter up the record.

Presiding Examiner: So far as I am concerned, if I got to reading this I would go back to this original and read it all but go ahead.

Mr. Chanler. I wanted to ask the witness' view on it.

Presiding Examiner: Now read the answer.

> A. "Answer. For the reason that I stated in my direct examination, Mr. MacKay. That goes largely to the fact that the contract along with the contracts such as with the City of Redding, which you heard something of this morning, were obtained under competitive conditions with those groups in Nevada which were actively inter-
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> [356]
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> ested in trying to // get the Bureau of Reclamation to give service to the Sierra Pacific area in Nevada from the Central Valley Project in California. We made a longer contract because we undertook"—it should be "undertook" although it is "understood" here—"because we undertook to build an additional line to supply them and we felt we needed that protection of a

long contract. I am very sure that those competitive conditions existed then and that there is still agitation among certain groups in Nevada to get a line and that—"

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By Mr. Chanler: Q. Will you read the next question and answer? A. May I ask who is the witness here?

Q. Mr. Moulton. A. "Question: Do you think there was any reason for the Federal Government building a line over the mountains to supply that area with electricity in view of the conditions that prevail, as far as the government furnishing any similar type of energy to the people of California?

"Answer: Yes, I do."

Q. Give me the next question.

A. "Question: What groups in Nevada, if you recall, what particular groups was it that acted in that behalf?

"Answer: It was either an official—I think, any official State body known as Nevada-Colorado River Commission. They held a series of meetings on that matter. Met with the Bureau of Reclamation representatives, according to the information that reached me. Also at that time two United States Senators in Nevada, Senator McCarren and Senator Maloney have both personally given time and attention to that matter."

By Mr. Chanler: Q. I will ask you once more: In reading that testimony by Mr. Moulton, do you still deny that the

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contract // here in question was entered into to meet competitive conditions? A. Well, I think that, as I stated this morning, there was much talk about the possibility of power available to the Colorado River Commission. I believe they have some 30,000 kilowatts or such a matter allocated to them from Boulder—maybe it is more than that—but it was my opinion and it is my opinion now, that it was not practical to get that power up to Sierra Pacific and that the contract in reality was not made to meet competition.

Q. You disagree with Mr. Moulton on that point then, is that right? A. As the sole main reason for the contract, yes, I do. There was some threat of competition, but as I said before—and I think I have been consistent—I think it was not a real threat.

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By Mr. Chanler: Q. Mr. Pollard, when you were discussing [at yesterday's hearing] this list of resale customers that were excluded in Pacific Gas & Electric application made in 1949 for the 6 percent increase, you stated, and I call your attention to the fact that Mr. Moulton had generally described these as being situations where competitive conditions prevailed, and you read through the list and you stated that among others Alameda and Palo Alto did not have competitive conditions? A. Yes, I think I said that.

Q. Have you before you your copy of Exhibit 10 which is the testimony in the 1945 proceedings before the California Commission? A. Yes, I have it here.

Q. Would you turn to page 73? I would ask you to read the question and answer, the last question on the page, line 19, beginning:

> "Right there, Mr. Beckett, what additional facilities do you have in mind in the service of the customers that you have testified to and Mr. Pollard testified to?
>
> [371]
>
> "Answer: Until now, for some years, the company has felt reasonably assured holding these resale customers. Going back ten years or more, there was

danger of losing this or that one to isolated plants. That is to say, that City of Palo Alto, City of Alameda, might put in its own electric generating plant, but gradually the costs of construction have risen and particularly during the war period, so that the business was stablized and no five-year contract was necessary, but now we are—the war is over, we are going to a period in which two things are expected. First is the competition, perhaps of the federally-owned transmission system at rates such as have been put in the record this morning."

Q. Would you read the next question and answer?

A. "Mr. DuVal: You mean production system?

"Answer: How is that?"

Q. Just one more.

A. "Question: You mean production system?

"Answer: I said transmission system. It is transmission to the customers that we are of course concerned with in competition and, in addition to that also is the possibility that the isolated plant threat may

come up again after the war and after // materials, engines possibly may be improved, more efficient engine, possibly the lower costs become available, so again this five-year contract then becomes desirable."

Q. Mr. Beckett at that time was rate engineer? A. Yes, sir.

Q. What is his present position? A. He has retired. He has been retired for several years.

Q. Do you know him? A. Yes.

Q. Was he a competent engineer? A. Very.

Q. Would you still insist there was no competitive situation in Palo Alto and Alameda and the other cities to which Mr. Moulton referred?

Mr. Searls: I object to pursuing this line of questioning on the line that it is immaterial in this proceeding as to whether Palo Alto or Alameda were competitive situations, and if we are to pursue every one of the statements that were made by Mr. Moulton in this proceeding we could be here for weeks and weeks on end. I don't see that it is material in this proceeding and I don't see why we should have to go into all these matters. I do object on the ground of immateriality.

Mr. Chanler: May I say, Mr. Examiner, that I think this is the last question on this subject.

Presiding Examiner: It may be the last, and I hope it is. I think on the question of materiality, Mr. Searls, we covered that maybe yesterday or the day before. The Examiner was disposed to allow it to come in. The Examiner believes at this time that it is becoming repetitive. We have covered this question with this witness. You have at least identified certain testimony which presumably you will later offer. What it shows is that material with respect to PG&E and Sierra is one matter, one thing. I think you are now repeating yourself a good deal, Mr. Chanler.

Mr. Chanler: This particular statement of Mr. Beckett's I had not called to Mr. Pollard's attention.

Presiding Examiner: We will allow this but I hope that you will keep in mind that we have covered this question of competitive conditions, mainly with the very cities in California. At the moment the Examiner doesn't see the direct connection between such contracts and the contract that is of primary interest in this proceeding. The question will stand and the witness will answer.

Do you have it in mind, Mr. Pollard? The Witness: Yes, I think I do. I would like to say that when I spoke—

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Presiding Examiner: I would like you to answer the question. If it becomes necessary to qualify it, you may. The Witness: Perhaps I had better have the question read.

Presiding Examiner: Would you read the question? (Question Read.) A. I think I will have to answer that by more than just yes or no. I say yes, that I insist from the standpoint of the thought that I had in mind when I answered the question yesterday. Mr. Beckett's testimony here refers to competition with diesel engine and isolated plants. Of course, we are also under that threat of competition with any large customer, whereas what I was referring to was governmental competition.

So far as I know, neither Alameda nor Palo Alto had any approach from the Bureau for Bureau power at that time. That was the answer to my question.

By Mr. Chanler: Q. I guess we misunderstood each other. I was trying to ask you whether or not these contracts were entered into to hold the business against any kind of competition.

Presiding Examiner: You are speaking of contracts with the various cities?

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Mr. Chanler: The reason, Mr. Examiner, that I am referring to the contracts with the cities now, if I may explain very briefly, is that the testimony previously read from Mr. Moulton and Mr. Beckett, was that the Sierra contract was entered into for the same reasons, referring back to these other cities, and I therefore want to show what the reasons that they were referring to were. They didn't, except in one case that I read yesterday, go into details as to Sierra, they said the Sierra contract was entered into on competitive conditions similar to those we have just talked about. So I figure that I have to show what that reference was. The reference was to these other cities. That is the reason I am putting it in.

Presiding Examiner: All right.

Mr. Chanler: I will get to Sierra as soon as he answers my present question.

Presiding Examiner: The question has been answered. It is up to you to put another one.

By Mr. Chanler: Q. Your present position, I take it, is that there was danger of what we might call internal competition as distinguished from federal power competition in all these situations, is that it? A. No more than there is

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danger of competition // at all times with all customers if they can find a substitute source of power that is as good and as cheap as what the company has to offer.

Presiding Examiner: When you say "in all these situations", Mr. Chanler, do you include Sierra Pacific?

Mr. Chanler: Yes, Mr. Examiner. I am now speaking of the group that were excluded—that were included in the competitive situations either by the 1945 or the 1948 hearing, referring directly to Sierra, and excluded from the increase from the 1949-1950 hearing on the ground that they were all competitive situations.

Presiding Examiner: Go ahead.

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By Mr. Chanler: Q. You remember the memorandum that you prepared for Mr. Fisher, the second document in Exhibit 11, the memorandum report you prepared on May 13, 1946? A. Yes.

Q. On page 3 of that memorandum, in the middle of the page, you have a list of items and then you say, "There are other possible sources from which Sierra might secure additional power. 1) build their own steam plant at Reno." That was at that time a possibility, was it not? A. That was under consideration as one of the alternatives, yes, sir.

Q. So there was always a possibility of that kind of competition also, was there not? A. Surely, I say it was considered as an alternative.

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Q. [By Mr. Searls] Can you state whether the rates provided by Schedule P-6, as they were in effect in 1923, which is the schedule that appears attached to the second contract in Exhibit 5—that is, the 1923 contract—was there any change in that schedule P-6 between the date in 1923 when that contract was executed and 1937? A. [By Mr. Pollard] I think not.

Q. Did Schedule P-6, as it existed in 1923, exclude customers which had generating facilities of their own?

Mr. Chanler: You are speaking now of Exhibit 5?

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Mr. Searls: The same Schedule P-6 which I just // referred to which is attached to the second contract in Exhibit 5, a part of FPC Schedule No. 1. A. The answer to your question is, No.

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Q. [By Mr. Searls] Was it not a fact that if there was to be any possibility of the Sierra Pacific Power Company obtaining power from the Bureau of Reclamation, that such power would have to be obtained through the State of Nevada or some agency of the State of Nevada as an inter-

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mediate purchaser? // A. [By Mr. Pollard] That would be true if the Bureau didn't have enough power to satisfy applicants of the preferred class and also satisfy the requirement of the Sierra Pacific?

Q. As far as you are informed, is it not a fact that the only proposals ever considered by the Sierra Pacific Power Company did involve the Nevada-Colorado River Commission as an intermediary in some capacity? A. I think the discussions were on that ground. I would like to qualify that answer a little. I think the pressure for power came from the direction of the Colorado River Commission and was not being urged by Sierra Pacific. I do understand that there was some talk of a transmission line directly from one of the Bureau plants to Reno which was abandoned or turned down because of the relatively high cost and the long time to accomplish it.

Q. Which one of the Bureau installations did you have in mind when you just referred to a transmission line?

A. The Shasta Dam plants.

Q. Was it possible for the Bureau of Reclamation to build a transmission line from Shasta Dam to serve the Sierra Pacific Power Company in 1949 or 1950? A. No, I think it was not, because it would have involved the Bureau securing an appropriation from Congress for the money to finish such line.

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Q. Do you have any idea how long it would have taken the Bureau to have constructed such a line after obtaining an appropriation? A. No, I don't know definitely. It would have taken a considerable time.

Presiding Examiner: That is very indefinite. You are a practical man in this utility business over many, many years. You know the distance involved. While you may not be a construction engineer, you certainly can give something better than you have stated.

The Witness: These were not my negotiations. I don't really know even the length of the line that was involved. I think it was quite a long line, possibly 175 or 200 miles, something of that order.

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Q. [By Mr. Searls] In other words, if the Bureau of Reclamation was offering power from Shasta Dam over a two-circuit transmission line, you would not consider that the cost of such power could be compared directly with the cost of power furnished by the Pacific Gas and Electric Company because the cost of some standby power would be required? A. [By Mr. Pollard] That is what I understood when I said Yes.

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Q. [By Mr. Searls] To your knowledge, was it ever suggested at any stage of these negotiations that the contract should be for a lesser term than 15 years? A. [By Mr. Pollard] Not to my knowledge, no. Not to my personal knowledge.

Q. Will you state, Mr. Pollard, whether during the period when Schedule P-31 was first placed in effect, to 1948 when the contract was made with Sierra, any customers were served under Schedule P-31 who were not in a competitive situation? A. Yes.

Q. Can you give some examples of that, or do you have a list?

Mr. Chanler: I think the question is incompetent, irrelevant and immaterial.

Presiding Examiner: The objection will be overruled.

A. The question was customers who were not subject to competition?

By Mr. Searls Q. Yes. A. Coast Counties Gas and Electric Company, Indian Valley Light and Power Company, Northern Counties Utility Company—they were not on P-

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31. Pinole Light and Power // Company; City of Healdsburg; City of Santa Clara; City of Ukiah; City of Lompoc. Those are some that were not subject to any possibility of securing Bureau power at that time.

Q. I refer you now to Exhibit 9, the opinion of the California Public Utilities Commission.

Presiding Examiner: Excerpts from, you mean?

By Mr. Searls: Q. Excerpts from that opinion in 1945, on the occasion of the establishment of Schedule P-31. I call your attention to page 348 of that exhibit and to the sentence which begins at the end of that page. Will you read that? A. "As noted above, Pacific intends to make its Schedule P-31 available to all private and public resale customers which now have Schedule P-6 available."

Q. Is it true, then, that Schedule P-31 was applied after it came into existence, without regard to whether a competitive situation actually existed? A. Yes. In the following paragraph of that same document it so states.

Q. Would you read that? A. "It justifies the offer of reduced rate to resale customers primarily in order to safe-

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guard existing business // and likewise to generally preserve the uniformity of its resale rate classification, even where competition is not as yet as imminent as in the Northern Sacramento Valley portion of Pacific system—"

Presiding Examiner: Go on.

A. "—where Shasta-generated power can most readily be supplied."

By Mr. Searls: Q. Then would you say that the fact that a customer is offered or placed upon the Schedule P-31 rate has anything to do with whether a competitive situation exists with respect to that customer? A. It does not, no.

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Q. [By Mr. Chanler] You spoke of these several purchasers which were given the P-31 rate, but as to which there were no competitive conditions. You listed quite a number? A. [By Mr. Pollard] Yes, sir.

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Q. Were any of those customers excluded from the // six percent rate increase authorized in 1950? A. Yes.

Q. Which ones? Will you look at the list? On page 8, Exhibit 18, I think you will find them listed. Alameda, Biggs, Gridley—were the ones you listed as being non-competitive, included among those whose rates were not increased, which were excluded from the increase in that order. A. What is your question?

Q. Were any of the purchasers that you described a moment ago as non-competitive purchasers which had been given the P-31 rate, which you said were non-competitive included in the list of purchasers which were excluded from the rate increase sought by Pacific in 1949? A. I think most of them were excluded. Most of those that I mentioned.

Q. Let's get that list. On page 8 of Exhibit 18 they are listed. Will you point out which of those are among the ones that you have just listed? I may not have heard you. I want to know which ones they are. The list beginning "Alameda, Biggs" that I started to read. A. Yes.

Q. Which of those, which of the ones that you listed a few

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minutes ago, are included in that list? // A. I think I mentioned Healdsburg, Lompoc, Santa Clara, Ukiah. Those I am sure I mentioned.

Q. Those you say were not competitive in any sense, either from internal* competition or Bureau competition?

A. Yes, there was no threat of competition in those cases.

Q. If in requesting that they be excluded, requesting the California Commission that they be excluded, witnesses for PG&E stated that these contracts have been entered into under competitive conditions, they were in error?

Mr. Searls: We have been all over this before. I object to the repetition, Mr. Examiner.

Mr. Chanler: I would like to ask him now.

Presiding Examiner: I think it is repetitive, but I will let you ask him again.

Mr. Chanler: I have not stated it in this way.

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Presiding Examiner: Answer the question.

The Witness: I would answer the question this way by saying that my interpretation of what our representatives said as to the competition and so forth, that competition was not the only thing that was mentioned in their testimony, and all of these changes or lack of changes, lack of increases, were not based on competitive conditions, at least imminent competitive conditions.

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*The transcript has "international" here, obviously a transcription error. (See reference to "internal competition" at Tr. 375)

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Q. [By Mr. Chanler] The California Commission stated that P.G. and E.'s representatives had stated to it that P-31 would be made generally available to resale customers.

A. [By Mr. Pollard] What order are you talking about?

Q. The order authorizing P-31. A. Yes, we offered it to everybody, to everybody who could qualify.

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Q. When did you first offer it to Sierra? A. In the 1948 negotiations.

Q. You testified before the recess as to various charges that led you to believe, or the thought was generally accepted leading to the conclusion that the suggestion that power be obtained from the Bureau through the Colorado River Commission was not as practical or as good a proposal as the P. G. and E. contract. Is that correct? A. That is my understanding, yes, sir.

Q. You mentioned the distance from Reno to the source of power and the fact that there would only be two lines and one source of power, and the length of time that it would take and so forth, did you not? A. Those were factors in the consideration undoubtedly.

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Q. [By Mr. Wahrenbrock] Mr. Pollard, I would like to get a clear statement in one place and ask you to take whatever time is necessary to refer to any papers that may be available for the purpose of making an answer, as to what other sales or resales P. G. and E. now makes, and whether they are under the R Schedule which appears as the fourth sheet of Exhibit 8, or whether they are at some other rate.

A. I think I have a list here that I can read from, Mr. Wahrenbrock, in answering that question.

Q. Will you proceed, Mr. Pollard? A. Those which are now under the so-called R rate are: Vallejo Electric Light and Power Company, Bay Point Light and Power Company, California-Pacific Utilities Company, Coast Counties Gas and Electric Company, Indian Valley Light and Power Company, Northern Counties Utilities Company—that company has been sold, so you can strike that off; that is now a part of the California-Pacific's properties; the Pinole Light and Power Company, California-Oregon Power Company. Those are all that are on Schedule R at the present time.

Q. That is seven present companies? A. Yes, sir.

Q. Each of those companies purchases its entire requirements to serve its utility load from P. G. and E.? A. No. California-Pacific Utilities Company operates a number of properties and those that are on the R Schedule are those that are within our territory, within Pacific Gas and Electric Company territory. In other words, all California-Pacific's properties are not in our territory.

Presiding Examiner: So that they do buy from others? The Witness: Yes.

Presiding Examiner: Others than P. G. and E.?

The Witness: Yes, but not in our territory.

By Mr. Wahrenbrock: Q. Their properties are separate isolated properties, not interconnected with each other?

A. Yes.

Q. So far as their properties are located wholly within what you regard as your territory, they purchase their entire energy requirements from you? A. Yes.

Q. Is there any other company that does not purchase its total requirements from you in this list? A. Yes. California-Oregon Power Company. I think California-Oregon Power Company is not under Schedule R. It is under all the

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rate terms of Schedule R, but Schedule [R] // is not mentioned except to say that if Schedule R is ever changed by order of the Commission, either modified or another schedule substituted therefor, then the California-Oregon Power Company rate will be changed in like manner, commensurate therewith, I believe is the word.

Mr. Searls: Mr. Pollard, there is already a full explanation of what the rates to California-Oregon Power Company under the contracts contained in Exhibit 6 are, isn't there? The Witness: Yes. The whole contract is there.

Mr. Wahrenbrock: I think there are some differences between what Mr. Pollard has just said and what is shown by Supplement No. 1 to FPC No. 6, which is the last sheet in Exhibit No. 6. I will let that pass at the moment.

Mr. Searls: I am sure it is unintentional.

By Mr. Wahrenbrock: Q. That completes your statement as to the purchasers for resale who take under the R Schedule? A. Yes, sir.

Q. Will you continue? A. The contract with Sierra-Pacific Power Company is a special contract, and it is in the record. We have special contracts with the City of Alameda, City of Biggs, Gridley.

[411]

Q. Is that a city? A. Yes. Healdsburg.

Q. Indicate which are cities. A. These are all cities that I am reading now. I will tell you when I quit.

Q. Thank you. A. Lodi, Palo Alto, Redding, Roseville, San Francisco, Santa Clara, Ukiah, Lompoc, and the

Plumas-Sierra Rural Electric Cooperative, Sacramento Municipal Utility District, Turlock Irrigation District, and Yosemite National Park.

Q. That completes your listing of purchasers for resale? A. Yes, sir.

Q. Do all of those that you have just listed under special contracts, with the exception of Sierra-Pacific, purchase their entire requirements from P. G. and E.? A. Except those that I mentioned that didn't.

Q. I said special contract purchasers now, this last list. A. San Francisco does not purchase its entire requirements from the company.

Q. Any others? A. Turlock Irrigation District, and I am not informed about Yosemite National Park, but that is

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a very // small service in the park and I am not too familiar with the conditions.

Mr. Searls: They do have a generating plant there.

The Witness: Yes, I think they have a small hydro plant and we standby that with some special sort of contract.

By Mr. Wahrenbrock: Q. With those three exceptions, and the Sierra Pacific Company, all of these special contract sales cover sales of the entire requirements for resale of the purchaser? A. I think they do, yes, sir.

[422]

Q. [By Mr. Wahrenbrock] After the California Commission declined to make the increase applicable to Sierra Pacific—your sale to Sierra Pacific, and left that to negotiation, I believe you testified that you did have a conference or a conference was held, at any rate, with Sierra Pacific. Is that correct? A. [Mr. Pollard] Yes, sir.

Q. They declined to agree voluntarily to any change?

A. That is right.

[447]

Q. [By Mr. Searls] Mr. Pollard, in answer to a question of Mr. Chanler you referred to some testimony of Mr. Devore before the Public Utilities Commission of the State of California, which appears in Exhibit No. 12. I would like to refer you now to page 39 of Exhibit 12 and I will ask you to read the first two questions and answers on that page.

> A. "Question. Mr. Devore, do I understand correctly that over the 15-year contemplated period the average difference in cost is about half of one mill between the Reclamation—— "Answer. That is correct, based upon the bogey estimate as we worked it out.
>
> "Question. But that difference of one-half mill—approximately one-half mill, does not take into account any standby charges at all, does it? "Answer. That is correct."
>
> [448]
>
> Q. You didn't finish the answer, Mr. Pollard. A. "With the PG&E Company contract we have a certainty in there for standby over our company-owned plants; with the Bureau there is no provision made for standby after our plants. It did not seem worthwhile trying to talk that over, trying to see if there would be an additional charge for standby because the balance of the contract did not seem to justify its acceptance."

I think that last refers to the Bureau contract.

Q. Now, referring you to page 27 of the same exhibit, at the bottom of the page, where Mr. Tracy is being cross examined, would you read the last question on page 27 by Mr. Wehe, and the answer on the following page?

A. "Mr. Wehe. Mr. Tracy, if an alternate source of

> power were to come over a single transmission line would you consider that of sufficient stability to warrant you entering into a contract with the sole source of power? "Answer. That was considered, not only—that, is, that was considered when we were considering where the additional power was to come from, and while the main—one of the main factors, as I said, was
>
> [449]
>
> the fact that PG&E seemed to be the source // that it should come from, everything considered, nevertheless we did think along that line of receiving power over a single line from a single source as being very undependable power and we would have had, under that arrangement, for the benefit of the customers, to assure anywheres near reasonable service to get a standby source which of course would increase the cost of power considerably."

[452]

Q. [By Mr. Searls] Can you state whether it is a fact that counsel for Sierra Pacific Power Company, during the course of that proceeding, suggested that the proper method for effecting a change in the existing contractual arrangements between Sierra and Pacific was by renegotiation?

Mr. Chanler: I object to that question. The record speaks for itself as to what counsel for Sierra may have said at that hearing.

Presiding Examiner: You mean at the hearing, Mr. Searls?

Mr. Searls: It actually was in the course of oral argument at the conclusion of the hearings prior to our submission of a motion for interim rate increase in that proceeding.

Presiding Examiner: Isn't that in the transcript we have here?

Mr. Searls: It is not in the transcript we have here. It was reported in that proceeding.

Presiding Examiner: Do you deny that?

Mr. Chanler: I would like to have the exact language. I might point out that what he refers to is in the order of the Commission as follows, at page 40 of Exhibit 17. I have no objection to reading that.

[453]

Mr. Searls: What I had in mind was, as we have // already noted, the California Commission suggested renegotiation and it is our belief that this suggestion originated with counsel for the Sierra Company.

Presiding Examiner: The objection is overruled.

A. [By Mr. Pollard] I do not have that language in mind, Mr. Searls. I might say that I did go through that transcript and brief all of the testimony of Mr. Tracy and noted the remarks of counsel on either side, a copy of which I have at the hotel. I might be able to find that language between now and Monday.

Presiding Examiner: I don't think it is so very material one way or another.

Mr. Searls: We will withdraw the question at this time. I don't think we need pursue that matter.

Presiding Examiner: Whoever made the suggestion, it came to nought anyway.

Mr. Searls: We have no further questions, Mr. Pollard.

[455]

Q. [By Mr. Wahrenbrock] Has PG&E attempted to renegotiate with the other special contract purchasers that were excluded from the increases permitted by the California Commission? A. [Mr. Pollard] Yes, sir.

Q. All of them? A. Not all of them, but some of them.

Q. Which ones? Alameda? A. No.

Q. Biggs? A. I will tell you which ones: Healdsburg, Ukiah, Lompoc, and Vallejo Electric Light & Power Com-

[456]

pany. // Those I know of personally.

Presiding Examiner: Did you succeed in renegotiating?

The Witness: Not any of them yet, no. We are still talking with them, negotiating with them.

Mr. Wahrenbrock: That is all.

Mr. Chanler: May I ask one question?

Presiding Examiner: Yes.

By Mr. Chanler: Q. Those three cities, I think they were, that you just stated that you have undertaken renegotiation with, are three of the cities that you listed this morning, I believe, as to ones on which there were no competitive conditions? A. Yes, among others.

Mr. Chanler: That is all.

Redirect Examination

By Mr. Searls: Q. Mr. Pollard, has not the special contract between Pacific Gas & Electric Company and the County of San Francisco been the subject of renegotiation? A. Yes, it has. Successful renegotiations have been completed.

Presiding Examiner: I beg your pardon?

The Witness: Successful renegotiations have been completed.

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Presiding Examiner: Signed up?

The Witness: Yes.

Mr. Searls: That is all.

[547]

Q. [By Mr. Wahrenbrock] In response to previous questions I believe you listed some 15 or 16 special contract purchasers. Are you prepared now to state how their rates respectively compare with the proposed rates for Sierra Pacific? A. [By Mr. Pollard] Yes.

Q. Will you please do so? A. A number of them are on substantially the same rate so I have grouped them according to the rate that they are on. The cities of Alameda, Biggs, Gridley, Lodi, Palo Alto, Roseville, Santa Clara, and the Plumas-Sierra rural electric cooperative contracts are all on rate P-31—that is California P-31 designation—without the 6 percent increase of April 15, 1950, and without the ratchet clause.

Q. Excuse me. Without the 6 percent increase of— A. April 15, 1950.

Q. (continuing)—April 1950 and without the what? A. Ratchet clause. I don't know whether I have explained what we term the "ratchet clause" or not.

[548]

Q. That is not this excess of $8,000,000? A. No.

Q. All right. Will you explain the ratchet clause? A. The ratchet clause provides that the billing demand, in applying the demand charges, will be taken as the average between the current month's demand and the highest demand during the 12 months ended with the current month. That is what we call a ratchet clause. All of these rates for these customers that I have named are somewhat lower than FPC 3 supplement No. 1.

Q. If I understand you they would be substantially the same as FPC No. 3 before the supplement, isn't that correct? A. Yes, I think it is.

Q. Before you go on, let me clear up one thing. You said without the 6 percent increase of April 15 and without the ratchet clause. Do you mean also without the discount for kilowatt hours in excess of eight million dollars? A. Yes.

Q. Thank you. All right, will you continue with respect to the others? A. Let me check that one point that you have just raised now to be sure my memory serves me correctly.

[549]

I // was mistaken in that. The Alameda contract does have the eight million discount in it. Plumas-Sierra has it. It would make no difference in the others because none of the others ever go over the eight million in any one month—the others that I have read.

Q. [By Mr. Searls] Excuse me. You didn't mean that Plumas-Sierra was likely to go over eight million a month. You didn't mean to express an opinion? A. The contract has the clause in it in Plumas-Sierra, but the others I say do not, so I didn't want to take the time to look it up. I don't know whether they all do or not, but none of those others would go over eight million so it wouldn't affect their billing.

[558]

Q. [By Mr. Wahrenbrock] Because you have indicated that you felt that there was no competitive element actually entering into the fixing of the FPC 3 rate to Sierra Pacific, is that right? A. [By Mr. Pollard] You say "no element

[559]

of competition": I don't // think that competition was the decisive factor in arriving at the Sierra Pacific contract. I have said before, I think—and if I didn't say so I want to say so now—that there were a number of alternate possibilities of securing the power that Sierra Pacific needed, which I understand they considered and considered seriously, but I think that the conclusion was not because our rate was competitive with the rates offered by some others, but because of the fact that we were in a position to deliver and the others were not in a position to deliver.

Q. Then competition, you feel, was not a decisive factor in the sense that the bargain wasn't on the auction table with two offers available? A. Two acceptable offers.

Q. Yes. That is a more accurate explanation of your conception of the absence of competition in that case. A. Yes. Perhaps I could illustrate my feeling in the matter by saying that when you go down town to do some shopping you say "Shall I go to this store or the other one," you look around and you buy what you want, what you find in the store that you ultimately decide upon. Of course, there is competition in the retail trade and there is competition here in that sense.

[560]

Q. Your feeling is that Sierra Pacific had to // have the power now and Pacific Gas & Electric was in a position to make an offer now and no one else was in a position to make an offer now, but maybe two years from now at best? A. I don't think that they felt that there was a chance—I am not putting these words into Mr. Tracy's mouth, but it is my feeling that there was no chance that they would be able to get a better deal in two years or ten years, perhaps. I don't know, of course, how long it would take but I know it would have been quite a long time before it would have been possible to get an equally good proposal from the government at that time.

Q. If that is true, Mr. Pollard, why was it important to Pacific Gas & Electric to include in the 1948 contract, which was FPC rate schedule No. 3, provisions which had the effect of excluding Sierra Pacific from being able to obtain any substantial supply of energy elsewhere in the future for the term of the contract? A. My answer is the same now as it was before: that on account of the fact that we were spending a very large sum of money to make this additional power available, and we committed ourselves to spend a further sum of money if, as and when they needed the additional power, and we felt that a long-term contract without the Sierra going some place else, if an alternate

[561]

source // should develop, and taking a substantial part of the business away from the investment that we were contemplating.

Q. Isn't your special investment matched substantially by special investments of Sierra Pacific so that it is in an equally risky position so far as the investment in special facilities? Don't they have to meet you way out in the middle of Mountain Range there with special facilities that are useful only for the purchase of power from you to the same extent that you have to go to meet them? A. They may have been willing to accept the exclusion of another source of power for the same reason: that they anticipated continuing to use their investment in the second line or the third line.

[564]

Q. [By Mr. Searls] I call your attention to the number in the upper righthand corner of this sheet, which is revised CRC Sheet No. 1363-E, and that the sheet is entitled "Schedule P-31, Resale Power" and in the lower righthand corner it states "effective September 1, 1946."

I would ask that this be identified now as Exhibit 20.

[565]

(The document above referred to was marked for identification as Exhibit No. 20.)

I notice that beneath the heading of "Resale Power" there is in parenthesis "Optional with Schedule P-6." A. [By Mr. Pollard] Yes, sir.

[566]

By Mr. Searls: Q. I would like to ask you, Mr. Pollard, if this Exhibit 20 is the P-31 Schedule that was in effect during all of the year 1948? A. Yes, it was.

* * * * * * *

Q. This schedule which is identified as Exhibit 20 contains the discount for entering further in excess of 8 million kilowatt hours per months, does it not? A. Yes.

Mr. Searls: That is all.

Mr. Chanler: Points of information: What is the difference between this schedule P-31 and the schedule P-31 that was approved by the California Commission in 1946?

The Witness: That is it. This became effective September 1, 1946.

By Mr. Chanler: Q. Immediately after the hearings in 1945, they approved a Schedule P-31? A. Yes. There have been Schedule P-31s but this is the one that was in effect in 1948 when the Sierra contract was made.

Q. And it is the one the substance of which is carried into the present contract between Sierra and the company? A. FPC No. 3, yes, sir.

Q. FPC No. 3? A. Yes.

[595]

Presiding Examiner: Mr. Roberts, isn't the answer to Mr. Wahrenbrock's question given in the Commission's last opinion of 1950, which is here as Exhibit 18? The Witness: I believe it is, yes.

Presiding Examiner: Suppose you read it. It begins the first full paragraph on page 9. I said the Commission's opinion: It is a partial copy. The Witness: I am reading from Exhibit 18, page 9:

> "In justification of the proposed exemption of the 16 resale customers—"

Presiding Examiner: Which includes Sierra Power?

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> The Witness: (Continuing) "—Pacific states // that contracts with each have had the formal approval of the Commission, that the making of such special contracts was compelled largely by competitive conditions, that the contract rates are sufficiently compensatory to meet all direct costs of service, and that the retention of such customers for a term of years is of benefit to the utility and its customers as a whole."

Presiding Examiner: That is all I had in mind at the moment. The Witness: Since it was necessary to offer a competitive rate to part of these customers, we felt it was essential to offer it to all of them of that class who were in a similar condition—or, rather, took a similar type of service—whether or not those competitive conditions were as acute to each individual customer as they were to certain ones in that group.

[597]

Q. [By Mr. Wahrenbrock] Is it your position then that Sierra Pacific is one of the class of customers that the rate that Pacific Gas and Electric wants to make available to that class as a whole is determined in part by the fact that that rate is competitive in some conditions, and therefore it wants to make the same rate available to all purchasers in the class, though competition may not be regarded as actually present in a particular case at a particular time? A. [By Mr. Roberts] I think that summarizes it very well, Mr. Wahrenbrock.

Q. How do we deal, then, with the dilemma that you are carrying out that policy with respect to Vallejo, Bay Point,

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California Pacific, Coast Counties, Indian // Valley, Pinole, California-Oregon, by substantially the use of the R rate and with respect to Alameda, Biggs, Gridley, Lodi, Palo Alto, Leesville, Santa Clara, by substantially the use of the old P-31 which was considerably lower, and Healdsburg, Ukiah, Lompoc, by an intermediate rate which is still closer to the P-31 rate than the R rate? A. In each of those in the latter group, we have contracts which run for a period of time just as the Sierra contract does, and under the orders of the California Public Utilities Commission, under which those services come, we have been ordered to renegotiate those contracts and redetermine the rate by agreement and renegotiation just as we have been authorized to do in the case of Sierra Pacific, and have taken steps, in some of those cases, to increase the rate.

There is a further factor in the consideration of those latter in that the period of contract is due to expire in a much shorter time than the Sierra Pacific contract is due to expire. Most of them expire in the middle part of next year. We have looked to Sierra as the starting point. It is the biggest resale customer we have and with the longest period of contract, and we are here starting to put into effect the suggestion of the California Commission to get

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together and renegotiate // these contracts and put them on the resale schedule R.

[629]

Q. [By Mr. Chanler] I show you a letter at page 20 of Exhibit 11 dated January 22, from Mr. Fisher to you. The first two paragraphs deal again with the recoppering, do they not? A. [By Mr. Tracy] That is right.

Q. And then Mr. Fisher makes a proposal for giving you an additional line, but it was to be a 110 kv. line, isn't

[630]

that right? // A. That is true.

Q. And then at the top of the next page, he writes, does he not, making a suggested rate? A. That was the first suggested rate during our negotiations, and as the letter shows he said that the company would want a long-term contract, say 15 years, at a rate similar to the one already in effect, plus a fuel clause.

Q. What do you mean by a fuel clause? A. The rate is raised or lowered in accordance with the rise and fall of the posted price on fuel oil.

Q. Commonly known as escalator fuel clause? A. That is right.

[665]

Q. [By Mr. Chanler] During your negotiations with Pacific Gas and Electric, was there ever any suggestion that any part of the contract, as to rates or anything else, was to be for a lesser period than 15 years? A. [By Mr. Tracy] From the very beginning we talked of a 15-year term.

* * * * * * *

Q. Was it your understanding that the rate as well as the rest of the provisions of the contract were intended to be fixed for a 15-year period? A. That is true.

[815]

Mr. Wahrenbrock: Mr. Pollard, do you know what were the company's reasons for being willing, in 1948, to accept less than what it regarded as a fair rate of return on the contract with Sierra Pacific?

Mr. Pollard: I do not think that the company made its decision on the basis of a calculated fair return. I think the rate offered in the 1948 contract was offered because it was the resale rate that we had on file at that time for customers of this class.

[816]

Presiding Examiner: There was only one other, wasn't there?

Mr. Pollard: We had other resale customers but only one other Interstate customer.

Mr. Wahrenbrock: At that time you didn't have any other customer in a sale for resale in Interstate Commerce of firm power, did you?

Mr. Pollard: No, that is true. When I said California-Oregon, I was thinking of the present time. California-Oregon did not have this Interstate resale contract at that time.

Mr. Wahrenbrock: So the comparable customers that you had in mind were those in sales for resale in Intrastate Commerce?

Mr. Pollard: Yes, that is right.

Mr. Wahrenbrock: The list that you gave while you were on the stand, of companies or persons or entities that are now taking under your R rate or are taking under special contracts?

Mr. Pollard: That is true.

Mr. Wahrenbrock: In general, subject to such changes as have taken place during the intervening years?

Mr. Pollard: Yes, sir.

Mr. Wahrenbrock: Do I understand, then, that it is your

[817]

statement that the company was willing to take the // rate of return provided by the Sierra Pacific contract in 1948, because it felt it had to give Sierra Pacific a rate equal to that which it gave to these other purchasers for resale?

Mr. Pollard: I wouldn't use the words "had to give it to them" but the company felt it would be proper to give them the resale rate.

Mr. Wahrenbrock: Proper—why? Because of public relations to prevent a feeling of inequality in the minds of the purchasers?

Mr. Pollard: Perhaps you would say public relations had something to do with it, but we always try to fit our customers into the rate that applies to their particular class of service.

Now, why we always do that, of course there are many reasons, but fairness and equality would be one of them.

[892]

Q. [By Mr. Searls] Mr. Tracy, the last paragraph of the agreement of March 4, 1948, which appears in Exhibit 1, states "This agreement shall at all times be subject to such changes and/or modifications as said Commission may from time to time direct in the exercise of its jurisdiction."

It is apparent from the context that the word "Commission" there refers to the California Public Utilities Commission. Does that clause apply to all parts of the contract? A. It is my understanding that it is a part of the rules and regulations of the California Commission that such a clause

[893]

be inserted in contracts. My attorneys // advise me that there was no question being brought up at that time as to whether or not the California Commission had jurisdiction over the contract and as a matter of fact had approved up to date all of the contracts that we had with the Pacific Gas and Electric Company.

Q. Disregarding the question of whether there is a matter of federal jurisdiction, doesn't that clause apply equally to all parts of the entire contract? A. I think the Commission's having jurisdiction over contracts and rates is an accepted fact. It affects the public interest, yes, sir.

* * * * * * *

[895]

Q. [By Mr. Searls] Are you sure, Mr. Tracy, that you did not make a visit to San Francisco for the purpose of signing this contract? A. [By Mr. Tracy] To my knowledge I signed this contract in my office. I made a trip to San Francisco shortly before signing it to help clear up some small disagreements that we had in it, but I am sure that I wouldn't sign a contract outside of the office. I might have agreed to sign it but I didn't sign it outside of the office.

Q. Whom did you see on that trip? A. I believe Mr. Sutherland, and I don't know who else was in the meeting at that time.

Q. Were you accompanied by anyone? A. I had my executive engineer, Mr. Armstrong, I believe, and maybe Mr. Devore might have been at that meeting, too.

Q. Do you recall anyone who was present for Pacific Gas & Electric Company other than Mr. Sutherland? A. It may possibly be that Mr. DuVal was there and Mr. Pollard, also. There were several from Pacific Gas & Electric.

[896]

Q. Were you accompanied by any lawyer on your // own behalf? A. I was not, no—not at this meeting that I am thinking of.

Q. Do you know the approximate date of this meeting? A. I don't think that I have any reference to it. However, my letter to Mr. Sutherland of February 5, 1948 does state "At our recent conference in San Francisco covering the proposed contract", so it must have been somewhat before February 5.

Q. On that occasion, at the time of that meeting, do you recall that Mr. Sutherland advised you that the rate in this contract was subject to regulation and might not remain fixed for the entire period of the contract? A. No, sir, I do not remember any such conversation.

Q. Isn't it a fact that Mr. Sutherland told you, on that occasion, that although the term of the contract was 15 years, that the rate would not necessarily remain constant for that period? A. No, sir, he did not to my knowledge.

Presiding Examiner: What is that?

The Witness: To my best knowledge he did not.

[950]

Q. [By Mr. Searls] There has been some reference to a legal opinion as to whether the rate provided in the present contract, FPC Schedule No. 2, is a firm rate for the duration of the contract. Can you state who gave the opinion to which you referred? A. [By Mr. Tracy] I believe the opinion was that it was a firm contract as long as the public wasn't involved.

Presiding Examiner: The question was who gave it, Mr. Tracy, as I understood it. The Witness: I misunderstood the question.

By Mr. Searls: Q. Who gave that opinion? A. I believe that opinion was from both Mr. Dahlquist and Mr. Orrick.

Q. When did they give you that opinion? A. The first time was the approval of the 1948 contract and then again at the 1952 hearings.

Q. You mean that in connection with the hearing before the California Public Utilities Commission on April 15, 1948, that that opinion was given? A. That was repeated, yes, sir.

[951]

Q. When did they give you their opinion? A. When I was discussing the case with the attorney.

Q. Was that between the date when the contract was signed and the date of the hearing? A. This is in the case of the 1948 hearing you are referring to?

Q. Yes. A. I believe it was before.

Q. It was before the hearing? A. Before the signing of the contract.

Q. Did you have a meeting with Mr. Dahlquist or Mr. Orrick to discuss the contract before it was signed? A. I discussed the contract both with the San Francisco attorneys and also the Reno attorneys.

Q. Before it was signed? A. Yes.

Q. How long before it was signed did you discuss it with the San Francisco attorneys, Mr. Dahlquist and Mr. Orrick? A. I don't recall the exact date but it was probably the first of the year.

Q. The first of 1948? A. The first of 1948, in that vicinity, yes.

[952]

Q. Did you visit San Francisco for that purpose, // or how did you communicate with them on this subject? A. I don't recall but I think that probably it was for the purpose of discussing the proposed contract.

Q. You did visit San Francisco? A. I think it was probably the same time that I visited the Pacific Gas & Electric office, probably. I don't recall the exact date.

[956]

Q. [By Mr. Searls] If the Sierra Pacific had entered into a contract with the Colorado River Commission such as is contained in the draft of October 21, 1947, which appears in Exhibit 21, would not municipalities and other public agencies have been able to obtain power from the Colorado River Commission in preference to Sierra Pacific? A. [By Mr. Tracy] I think that the wording of that proposal would require that conclusion. However, the Colorado River Commission negotiations with the Bureau of Reclamation at that time was in the nature of attempting to have the preference clause adjusted to allow the preference to take effect on the first step only.

[957]

Q. Isn't that preference requirement a statutory // provision? A. That is why I said that it was a copy of a bill that I saw that was submitted to Congress.

Q. And under that draft of the contract of October 21, 1947 would not Sierra Pacific have been obligated to wheel power for the Colorado River Commission for delivery to municipalities and other public agencies? A. I didn't recall that there was any wheeling agreement connected with it. I may be wrong.

Mr. Searls: I don't think it is worthwhile going into that on the witness stand.

[982]

Q. [By Mr. Chanler] Now, Mr. Tracy, if it should show that the present contract rate, in the existing contract, became a burden on other customers of Pacific Gas and Electric, or if it failed to pay incremental costs, would you agree that under those circumstances the rate could be changed? A. The rate could be changed by Commission—

Mr. Wahrenbrock: Mr. Examiner, the identical question has been previously asked by me on my examination of this witness.

Presiding Examiner: Yes, it has, but it is all in the record now. Answer yes or no, please, Mr. Tracy, to your counsel's question. A. Yes.

By Mr. Chanler: Q. And if you were advised by your

[983]

counsel that the // rate, under those circumstances, could be changed by the Commission, would you be prepared to consider renegotiating such a change with Pacific Gas and

Electric? A. Under those conditions, yes.

[986]

Q. [By Mr. Wahrenbrock] Why would you feel that if Pacific Gas and Electric's return from the sale to you produced less than its incremental costs, its rate should be subject to renegotiation? A. Nothing has been shown to the contrary, is that right? In other words, what I mean, this is a hypothetical case.

Q. I am addressing myself to the question you just answered from Mr. Chanler a few moments ago.

Presiding Examiner: You stated that you would be willing to renegotiate. Now counsel is asking the question.

A. The answer would be yes.

Presiding Examiner: You better read the question, please, to the witness.

[987]

(The question was read as follows:

> "Why would you feel that if Pacific Gas and Electric's return from the sale to you produced less than its incremental costs, its rate should be subject to renegotiation?")

A. I am informed that the courts say that if a contract does not return out-of-pocket costs it can be broken.

By Mr. Wahrenbrock: Q. And that is your reason for saying that if this sale failed to produce out-of-pocket costs to Pacific Gas and Electric then it should be renegotiated? A. It could be renegotiated.

Presiding Examiner: You said it could be? The Witness: It could be, yes, sir.

Presiding Examiner: But I understood you to say, in response to Mr. Chanler, that you would be willing to renegotiate. Which is it now? The Witness: I think I would be obliged to renegotiate.

Mr. Wahrenbrock: No further questions, Mr. Examiner.

By Mr. Searls: Q. Mr. Tracy, isn't it your position then that you would not renegotiate this contract unless you were convinced that the only other alternative was to accept a Commission's determination as to what the rates of the

[988]

contract should be? A. I don't think that this is the point to answer that question, Mr. Searls.

Q. Well, isn't it, in much shorter words, your position that you will not renegotiate unless you are obliged to? A. I think that is a fair statement.

Mr. Searls: That is all.

[1006]

Q. [By Mr. Wahrenbrock] I want to go back to these assumed deficiencies and ask you whether in October of 1947 there was, as a practical matter of economical physical construction possibility, any feasible mode of supplying such deficiencies except by agreements with Pacific Gas and Electric along the lines of those which were actually negotiated? A. [By Mr. Devore] I don't hesitate to answer the question. I am trying to phrase it in words that will be clear. The Pacific Gas and Electric, holding the contract to purchase with Sierra, was the logical source to secure the power, and in my opinion they contracted to provide all the power requirements.

Q. They contracted in which contract? A. In 1938.

Q. Yes. Go ahead. A. And I think they had certain obligations to fulfill the requirements during this period. If that was not the interpretation then long prior to this point of approaching the shortages, arrangements should have been made for supplying the deficiency that was anticipated in the future. As you well know, a power system cannot ride on the power that is available. They must have the anticipation into the future. That applies to the circumstances. If

[1007]

you were to secure power from the Bureau it is a question of three years or five years or something from the time of contract to the time of delivery. With the Pacific Gas and Electric Company it was a shorter period because of the less difficult problems to overcome that were not physical, and a less physical problem to overcome.

[1009]

Q. [By Mr. Wahrenbrock] As I recall your testimony about the proposals that were under consideration for obtaining Bureau of Reclamation power, you contemplated, initially, the receipt of energy over a single line at Summit.

[1010]

During the period in which there was only that single point of delivery by a single line from the Bureau's energy plant to Summit, you did not include in your estimate of cost of Bureau power any provision for standby for that supply, did you? A. [By Mr. Devore] In the cost of power as shown in the figures I did not provide dollars and cents for standby. In discussions I mentioned that that was one of the objections to taking power over a single line and that consideration should be given to securing standby from the Pacific Gas and Electric Company.

[1011]

Q. To enable your company to meet its utility obligations in accordance with standard normal operating practices, whatever the cost of providing that standby would be from Pacific Gas & Electric would have had to be added to the cost of Bureau power for the period of time in which the Bureau of Reclamation had a single line to Summit, is that true? A. That depends upon who assumed the obligation of providing the standby.

Q. Yes. There was no suggestion that the Bureau of Reclamation, at the rates which were being discussed, would provide that standby, it that not true? A. That is true, and it is also true that it wasn't considered that they would not have to provide the standby. I told them that standby would have to be provided. I did not mention where standby costs should fall.

Q. Do you have any idea of the cost of procuring such standby under those circumstances from Pacific Gas & Electric at Summit? A. I understand they have a standby rate on file.

[1029]

Q. [By Mr. Searls] I would like to refer you to page 60 of Exhibit 12, Mr. Devore. I can give it to you here if you like (handing to the witness). On that page appears a statement made by counsel for your company in 1948 before the California Comission. If you would just read the two full paragraphs on that page to yourself. Have you finished reading that? [For paragraphs referred to, see Tr. 1709] A. [By Mr. Devore] Yes.

Q. Do you agree with those statements of Mr. Dahlquist? A. Perhaps they are colored a little.

[1132]

[Oral argument by Mr. Chanler before Federal Power Commission, July 22, 1953]: We wanted the contract, too. We were a utility, and we didn't want to deal with public power too much. They might come in and cut into our own area in Nevada, once they got there. We were glad to make a deal with them. There is no question about that. We wanted to, provided we could get a suitable rate. When we got it we went all-out to establish it.

[1176]

[Argument of Mr. Wahrenbrock before Federal Power Commission, July 22, 1953]: Sierra didn't want to buy from the Bureau of Reclamation, because the Bureau of Reclamation's contracts would have required it to wheel to Reno, and if they could have gotten a municipal power system set up in Reno, Sierra Pacific would have lost its biggest customer under that contract. Sierra Pacific didn't want to buy from the Bureau of Reclamation, which was the best chance they had. That power was not firm power. They woud have had to continue to contract with Pacific Gas and Electric for stand-by power.

Besides, it wouldn't be there in time. There was a deficiency over a period of four years in their ability to carry their peak load. That is clearly brought out in my cross-examination, with some difficulty, of Sierra Pacific's witness, Mr. Devore, on the question.

It is perfectly plain that there was no real alternative to this service. They had to deal with PG&E. They made a good deal. PG&E apparently, as far as these records show, entered into this, not because its engineering staff advised it to do so, but from a decision from top-level down to do so, after Senator McCarran had been consulted by some of the people.

[1188]

[Oral argument before Federal Power Commission, July 22, 1953]: Mr. Searls: The [California] Commission has not authorized the company to change the rates in effect for certain of the P-31 customers under special contract. It has said that an opportunity should be afforded to those customers, which are just some of the customers under P-31, to renegotiate the contract, and it says that those customers may be placed on a standard filed tariff or, if renegotiation results in something else, that approval will have to be obtained from that Commission.

The Sierra Pacific Power Company has refused to negotiate expressly taking the position that they won't agree to any change in this rate unless they have to. And while that appears to be their privilege, so far as the California Commission order is concerned, we doubt whether it is the

[1189]

result that the California Commission intended.

[1229]

The Witness: [Mr. Roberts] We believe that we are entitled to at least five and a half percent. The rate which we have proposed for service to Sierra is not based on yielding the company a full rate of return.

Presiding Examiner: Why not, Mr. Searls?

Mr. Searls: It is based on giving to Sierra the same

[1230]

resale rate that is given to other resale customers // of the company. It is what we call our schedule R rate, which is in effect for other resale services with exceptions as has been brought out in this record, but it is what the company considers its standard resale rate and it was the company's decision not to ask for any different rate for this service to Sierra than to its other resale customers.

Presiding Examiner: Do the rates to the other resale customers produce a 5.5 return for the company?

Mr. Searls: No, Mr. Examiner, they do not. The standard resale rate was fixed in a proceeding by the California Pubilc Utilities Commission at the same time as all of the other rates of the company were fixed, and the Commission, the California Commission, did not allow in its rate fixing necessarily the same rate of return to each class of customer.

It was concerned with the overall rate of return. So the rates for any particular class do not follow exactly the cost of service and we are well aware that our rate for resale service is substantially below the full allocated cost to that service.

Presiding Examiner: Thank you. That clears up the thought I had anyway.

[1298]

Q. [By Mr. Searls] Are you sure of that? A. [By Mr. Roberts] There are actually two contracts with Pinole, one under P-31 and one under P-6. The Pinole Light & Power Company, both points of service were increased to Schedule "R" on November 10, 1952, which is the equivalent to FPC 3, Supplement 1. As a matter of fact, all of the public utility corporations with the exception of Sierra Pacific are now served, and have been since November 10, 1952, on Schedule "R".

Q. I started to ask you to list the customers. What is the

[1299]

next corporation customer on your list? // A. The Bay Point Light & Power Company.

Q. Were they served under the P-31 rate? A. Yes, they were until November 10, 1952.

Presiding Examiner: Let us name the companies and get them all in. You have named two out of nine, is that it?

By Mr. Searls: Q. Could I ask the date of that Bay Point contract? A. July 21, 1950, to expire August 25, 1955.

The next company is California Pacific Utilities Company. We have two contracts with that company, both under P-6 from 1950 until November 10, 1952, and on Schedule "R" from November 10, 1952. Their contract is in effect until November 6, 1955.

The Vallejo Electric Light & Power Company was under contract for service on P-31 from July 30, 1952, until August 27, 1955, but was increased to Schedule "R" on November 10, 1952.

We have two contracts with the Indian Valley Light & Power Company, both under Schedule P-6. The contract was in effect from June 10, 1951, to June 10, 1954. This customer was placed on Schedule "R" November 10, 1952. Both of the contracts with Indian Valley are concurrent and expire June 10, 1954.

The Coast County Gas & Electric Company is under contract dated February 8, 1952, and is effective until

[1300]

August 31, 1957, served under P-31 until November 10, 1952.

Q. And after that date? A. And thereafter——

Q. At what rate after that date? A. On Schedule "R".

[1306]

Q. [By Mr. Chanler] The offer of the P-31 rate was made on October 24, 1947, I believe, and the resulting contract

[1307]

entered into in // the following March, isn't that so? A. [By Mr. Roberts] I believe your date is correct, yes, sir.

[1709]

[Excerpt from Exhibit 12, oral argument of Mr. Dahlquist, on behalf of Sierra Pacific Power Company before California Public Utilities Commission, April 15, 1948]

* * * * * * *

Now, I think that this Commission in the discharge of its duty, with the record that has been made here showing how dangerously close Sierra's position is to the limit of the load that its lines can carry and the growing community, and to set it over to some indefinite date on some highly speculative thing—nobody has come forward here and offered anything that is concrete and constructive at all, and as far as we know in the future to defer this thing until there had been an appropriation of Congress, and even then the Sierra Pacific Power Company might have to go on and try to get its power from the Pacific Gas and Electric Company; they could not afford to wait around, for the people of these communities that the Sierra Pacific Power Company is unable to supply that additional capacity and additional load, those people would be the ones that will be the most critical.

I think that this record shows that the Company has conscientiously and diligently studied the whole situation; there is no affiliation between the Sierra Pacific and the Pacific Gas and Electric Company, they have dealt on an arm's length basis; they have arrived at a contract that both parties, in good faith, sincerely believe fair and reasonable and that Sierra Pacific Power Company knows is [90] urgently needed, if they are going to serve this community it can not stand idly by now and wait until—for some future appropriation of Congress, when even the people who talked about the Bureau at that meeting, that the Bureau officials themselves say that it will take several years, and common sense and common knowledge shows that it would take a long, long while; this Commission can take judicial notice of the fact that you can not go out and buy all the equipment necessary to build a high line, you can not go into a hardware store and buy it; some of this equipment takes 30 months or more. Why should we defer this thing? On this record I do not see how this Commission can do otherwise than immediately grant approval of this contract.

* * * * * * *

[1755]

[Excerpt from Exhibit 17, Decision No. 47832 of California Public Utilities Commission]

* * * * * * *

Postwar Increases

During the period since the end of World War II in 1945 through 1951 the cost of the items necessary to provide electric utility service has shown general sharp unit price increases. For example, by Exhibit No. 1 the applicant shows that the average hourly wage rates (base rates) of weekly and daily employees have increased by approximately 61%, that the cost trend of electric light and power construction in the Pacific area[1] has increased by approximately 68%, and that the cost of living index for moderate income families in San Francisco up to the third quarter of 1951 has increased by approximately 44%. During the years 1946 through 1950 the capital invested in electric plant increased by 92%. Along with these increases there has been an increase in electric consumption per residential customer from approximately 1,350 kwhr in 1945 to more than 2,200 kwhr in 1952, which tends somewhat to offset the unit effect of these other increases for rate making purposes.

Applicant's Position

The applicant avers that with the increase in price levels following World War II the trend of the earnings of the electric department has been downward since 1946. The record shows that the applicant did not seek an increase in its electric rates as soon as its rate of return started declining. On October 19, 1949, the applicant filed Application No. 30717 with this Commission seeking rate relief at the earliest possible date by an increase of 6% in practically all of the applicant's then current electric rates and such further increase as the Commission might find reasonable. However, before the hearings started the request was revised so as to limit it to a general 6% increase, except as to certain contract customers. The record shows that at that time the company did not predicate the amount of increase on the basis of providing a fair and reasonable rate of return for its electric department. Its stated reason was to secure promptly the minimum increase in gross and net revenues then urgently needed to support its credit position and facilitate the sale of securities to obtain funds for necessary capital additions.

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[1] Exhibit No. 1—Pacific Division (Handy)

By Decision No. 43972, dated March 21, 1950, the Commission granted the 6% increase, effective with service rendered on and after April 15, 1950. According to applicant, it was hoped that inflation would be sufficiently arrested to make unnecessary a further increase in rates. The Korean War started in mid-1950 and since that time commodity costs and wage rates have continued upward and there have been very large increases in taxes, including federal income taxes. For example, the federal income tax rate in 1949 was 38%, in 1950 was 42%, in 1951 was 50¾%, and in 1952 is 52%. In a similar manner, the average property tax rate paid on the assessed value of the company's prop-

[1756]

erties in 1946 // amounted to $4.30 per $100 of assessed value; in 1950 the rate had risen to $5.34.

* * * * * * *

Pacific Gas and Electric Company
San Francisco, California

Revised C.R.C. Sheet No. 1363-E
Canceling Revised C.R.C. Sheet No. 1301-E

SCHEDULE P-31

Resale Power

(Optional with Schedule P-6)

Description of Service:

This schedule is applicable, on contract for periods of 5 years, to electric energy supplied at standard voltages of 2200 volts or over, to other electric utilities and to municipalities for distribution and resale where such utilities or municipalities take their entire electric energy supply from the Company.

Territory:

The entire territory served, except the San Joaquin Power, Humboldt and Coast Valleys Divisions, North Bay Division north of Santa Rosa, Shasta Division north of Montgomery Creek, and the territory formerly supplied by the Red River Lumber Company.

Rate (A):

Service at 2200 volts up to and including 25,000 volts.

Demand Charge:

First 50 kw. or less of maximum demand	$75 per month
Next 150 kw. of maximum demand	$1.50 per kw. per month
Next 300 kw. of maximum demand	1.00 per kw. per month
Next 500 kw. of maximum demand	.75 per kw. per month
Next 1000 kw. of maximum demand	.60 per kw. per month
All excess kw. of maximum demand	.40 per kw. per month

Energy Charge (to be added to the Demand Charge):

First 150 kwh. per kw. per month	7 mills per kwh.
Next 150 kwh. per kw. per month	5 mills per kwh.
All over 300 kwh. per kw. per month	4 mills per kwh.

Except that for all energy furnished in excess of 8,000,000 kwh. per month, the above energy rates shall be reduced by 0.5 mill per kwh.

Minimum Charge:

Applicable when the maximum demand in the current month or in the preceding 11 months has exceeded 25,000 kw.: $1.10 per month per kw. of such maximum demand.

Rate (B):

Service at line voltages in excess of 25,000 volts.

The rate is the same as that set forth under Rate (A) above with the demand charge decreased by 15 per cent and the energy charge decreased by 3 per cent, and the minimum charge decreased by 10¢ per kw.

Special Conditions:

(a) Voltage: Service under Rate (A) will be supplied by the Company at standard voltages of 2200 volts or more up to and including 25,000 volts, as requested by the customer.

Service under Rate (B) will be supplied by the Company at standard line voltages above 25,000 volts as available.

(b) Demand: The maximum demand in any month will be the average kw. delivery of the 30 minute interval in which such delivery is greater than in any other 30 minute interval in the month, provided however, that if the load is intermittent or subject to violent fluctuations a 5 minute interval may be used. The maximum demand to be used in computing charges under the above rates will be the mean of the actual maximum so determined for the current month and the highest such demand occurring in the year ending with the current month.

(c) Off Peak Demand: Any customer served on this schedule may, upon request, have his maximum demand measured by a type of meter which records the demand at all hours, in which case demands occurring between 10:30 P.M. and 6:30 A.M. of the following day and on Sundays and legal holidays will be ignored in determining the demand used for computing charges.

(d) Power Factor: The total charge for any month as computed on the above rates will be decreased or increased, respectively, by 0.25% (0.2% if energy used in the month exceeded 8,000,000 kwh.) for each 1% that the average power factor of customer's load in that month was greater or less than 85%, such average power factor to be computed (to the nearest whole per cent) from the ratio of lagging kilovolt-ampere-hours to kilowatt-hours consumed in the month, provided, however, that no power factor correction will be made for any month when customer's maximum demand was less than 10% of the highest in the preceding eleven months.

Advice No. 28-E—Date Filed July 24, 1946—Effective Sept. 1, 1946
—Resolution No. E-532
Issued by A. Emory Wishon, Vice-President and General Manager

Supplemental Joint Appendix

In the

United States Court of Appeals

for the

District of Columbia Circuit

No. 14,422

United States Court of Appeals
For the
District of Columbia Circuit
FILED FEB 16 1959
Joseph W. Stewart
CLERK

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner*

vs.

FEDERAL POWER COMMISSION, *Respondent*.

SIERRA PACIFIC POWER COMPANY, *Intervener*.

590

ON PETITION TO REVIEW ORDER OF FEDERAL POWER COMMISSION

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

In the

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for the

District of Columbia Circuit

No. 14,422

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ON PETITION TO REVIEW ORDER OF FEDERAL POWER COMMISSION

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OPENING STATEMENT FROM COUNSEL FOR PACIFIC GAS AND ELECTRIC COMPANY

[29]

Mr. Searls: I might say on that point, that I should have responded to Mr. Wahrenbrock's statement, that the law in a situation such as this, where the purchasing company uses some of the energy directly to supply customers in the State of origin and takes some the energy out of the State is not clear, and we are in the position of trying to comply with the law, whatever it may ultimately be determined to be. We have filed a petition with the California Public Utilities Commission to obtain an increase of exactly similar to that which is requested here over such portions of the sales as may be subject to its jurisdiction. We are confident, as I think everyone here is, in view of the Supreme Court decision in the California Electric Power Company case, that a large portion of these sales are subject to the Commission's jurisdiction. We do think that the matter as to resales made in California leaves it open to doubt as to whether the California Commission may have some jurisdiction, and we have followed the prudent procedure of requesting both Commissions for authorization with respect to sales under this contract, the authorization in each case, of course, to apply to whatever sales may be within the respective Commission jurisdiction.

* * * * * * *

[39]

Stanley B. Barton

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Searls:

Q. Would you state your name, Mr. Barton?

A. Stanley B. Barton.

Q. By whom are you employed, Mr. Barton?

A. I am employed by Pacific Gas and Electric Company.

Q. What is your position at that company?

A. I am manager of the Valuation Department.

* * * * * * *

[48]

Presiding Examiner: The detail appears on page 2, does it not, also, Mr. Barton?

The Witness: It appears in some greater detail, yes, on page 2, that is correct.

The 110 kv line is used exclusively for the purpose of supplying Sierra Pacific. The two 60 kv lines are used pri-

[49]

marily for service to Sierra, and incidentally to supply power to the P G and E Company Tamarack substation. The principal source of power for the lines is Drum Power House substation approximately 27 miles westerly from Summit.

In addition to the two 60 kv lines energy may be received into the lines from Spaulding Power House No. 1. In Drum Power House substation through direct connection with two 110 kv lines terminating there has the resources of practically the entire system of generating and transmission facilities of Pacific Gas and Electric Company available for power supply to Sierra Pacific Power Company.

The map on page 2 shows in more detail the location of the P G and E Company transmission lines from Drum Power House substation to Summit metering station, and Sierra Pacific lines from the Summit to the California-

Nevada line. The elevation at Drum Power House is 3,250 feet, and at Summit meter station 7,200 feet. The territory between is rugged, and much of it is covered with snow for about six months of the year.

The single line diagram on page 3 of the exhibit indicates the connections, the oil circuit breakers, the air switches between Drum Power Plant substation and Summit. It also shows the power plants indicated by name on the diagram in the immediate area.

* * * * * * *

[66]

Mr. Wahrenbrock: Before you go on, may I ask, what are the ages of these lines?

The Witness: Line No. 50, from Drum power house to Spaulding power house, was constructed in about 1917. There have, of course, been replacements and reconstruction since that time.

Mr. Chanler: 1917?

The Witness: Yes, sir. Line No. 101 running from Spaulding power house to Summit meter station was constructed in 1939. Line No 102 from Drum power house to Summit meter station was constructed partially in 1924,

[67]

approximately two- // thirds of it in 1924, and one-third of it in 1939.

That may appear rather peculiar, but lines 101 and 102 have been sectionalized and reconnected. Part of the construction in 1939 was connected to line 102 to complete it, and the remainder was designated as line 101. That is the reason for the two dates on line 102.

Line 155, the 110 kv line from Drum power house to Summit meter station, was constructed in 1949.

Mr. Wahrenbrock: This two-thirds of line 102 that was built in 1924, can you show on page 3 of Exhibit No. 2 which two-thirds of which line that is that was built in 1924?

The Witness: Yes. Line No. 102 on that diagram, page 3 of Exhibit No. 2, is the lower of the two 60 kv lines.

* * * * * * *

[189]

James F. Pollard

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Searls:

Q. Will you state your name?

A. James F. Pollard.

Q. By whom are you employed?

A. Pacific Gas & Electric Company.

[190]

Q. What is your position with that company?

A. Manager of the Commercial Department.

* * * * * * *

[193]

Q. It is true, is it not, that this contract has been designated by the Federal Power Commission as Pacific Gas & Electric Company's Rate FPC No. 1?

A. Yes. I might say that the rate provided for in this contract was the Pacific Gas & Electric Company's file schedule P-6 which was at that time applicable to electric service to other electric utilities for distribution and resale.

* * * * * * *

[195]

Q. I will refer you to the next section of Exhibit No. 5, Mr. Pollard, and will ask you what that section consists of?

A. That is another contract between the same parties—

between Pacific Gas & Electric Company and Sierra Pacific Power Company, which had changed its name since the last contract, and covers a period of fifteen years con-

[196]

tinuing until November 1, 1953 as appearing // on the last page of the contract.

Presiding Examiner: Does it supersede the contract you have just described as FPC No. 1?

A. Yes, and it constitutes FPC No. 2.

Mr. Chanler: I don't believe it superseded FPC No. 1. I think it became effective after it expired, I am not sure.

Mr. Searls: On page 5 of the contract, the language of the contract is that "This agreement shall continue in full force and effect until November 1, 1953 and shall supersede an existing agreement of like import between the parties hereto dated March 23, 1923."

The Witness: This contract was made on June 6, 1938.

Presiding Examiner: Is it 1938?

The Witness: Yes. 1938.

By Mr. Searls:

Q. Does this contract contain a provision stating that it is subject to changes or modifications which may be directed by the then Railroad Commission of the State of California in the exercise of its jurisdiction?

A. Yes. It follows the reference to the Commission's order authorizing the contract.

Presiding Examiner: The answer is "yes", Mr. Pollard.

[197]

By Mr. Searls:

Q. I refer you to the—

Presiding Examiner: May I ask first whether this has been filed with the Federal Power Commission—this contract of June 6, 1938?

Mr. Searls: Yes, your Honor. Mr. Pollard has testified that it is designated as FPC No. 2.

Presiding Examiner: I am sorry, I missed it. Go ahead.

By Mr. Searls:

Q. I refer you to the final section of Exhibit 5 and ask you what that consists of?

A. That is a contract between the same two parties which is dated March 4, 1948 and provides both for the construction of additional transmission capacity and the sale of power for a period of 15 years from its date, and also provides, at the option of the parties, for construction of additional transmission facilities during that period, if needed, in which case the contract will be extended for 15 years from the date of such additional construction.

Q. I believe, Mr. Pollard, the provision for the term of the contract appears in paragraph 11 on page 8?

A. Yes.

Q. And that provides that the first 15-year period

[198]

shall begin when?

A. After the first 110,000 volt line, which was also provided for in the contract, is completed and put in service.

Q. Do you know what that date was finally determined to be?

A. No, I don't know definitely.

Q. Perhaps you could supply that?

A. Yes.

Q. Was this contract filed with the Federal Power Commission?

A. Yes, it was. It constitutes FPC Tariff No. 3.

Q. And is this the tariff under which the Pacific Gas & Electric Company is now rendering service to the Sierra

Pacific Power Company?

A. Yes, sir.

Q. Does this contract contain a clause providing that it is subject to such changes or modifications as the Public Utilities Commission of the State of California may from time to time direct in the exercise of its jurisdiction?

A. Yes, it does.

* * * * * * *

James F. Pollard

was recalled as a witness, having been previously sworn, was further examined and testified as follows:

[228]

* * * * * * *

Examination by Mr. Searls:

Q. Mr. Pollard, will you describe Exhibit No. 8?

A. Exhibit No. 8 contains copies of four of Pacific Gas and Electric Company's tariff sheets, being Schedule P-6, which was effective September 1, 1937 and applies to electric

[229]

energy supplies to other electric // utilities and municipalities for distribution and resale where such utilities or municipalities take their electric energy entirely from the company. Schedule P-6 as effective July 1, 1939 is also applicable in like manner, and was amended as of the latter date under California Commission decision No. 32106.

Schedule P-31 is the third page and it is a schedule that was adopted first and became effective on August 27, 1945. It is applicable on contract for periods of five years to electric energy supplied at standard voltages of 2200 volts or over to other electric utilities and municipalities for distribution and resale where such utilities and municipalities take their entire electric energy supply from the company.

The fourth and last page is Schedule R which was established under the Commission's most recent electric rate decision.

* * * * * * *

James F. Pollard

upon being recalled as a witness on direct examination, having been previously sworn, testified under cross-examination as follows:

Cross-Examination by Mr. Chanler:

* * * * * * *

[316]

Q. State of Nevada amended the statute establishing the Colorado River Commission so as to give it power and authority to enter into a contract with the Bureau of [317] Reclamation for this precise purpose?

A. I have no direct knowledge of that. I believe they did pass some such statute but I had no knowledge of it.

Q. You heard of it at the time, didn't you?

A. I heard that they passed the statute.

Q. You heard those rumors of pressure to use that power, didn't you?

A. That is right.

Q. But you now state that that had nothing whatever to do in inducing Pacific Gas & Electric to reduce its rates from P-6 to P-31?

A. That is my opinion, because, as I stated, I think we were satisfied that even under the statute that you referred to and all this other pressure, it wasn't practical to deliver

Shasta power to Nevada on account of the cost and the delay in time.

Q. If it wasn't practical in your judgment for Sierra to get power from anywhere else, why did you reduce your rate?

A. Because we had in the meantime established P-31 as a resale rate and we had offered it not only to customers under competitive conditions but to all of our resale customers who could qualify.

* * * * * * *

James F. Pollard

was re-called as a witness, having been previously sworn, was examined and testified as follows:

Re-Direct Examination by Mr. Searls:

* * * * * * *

[385]

Q. It is a fact, is it not, Mr. Pollard, that the Bureau of Reclamation is required to give preference to certain classes of customers in making sales of power from the generating plants over which it has control?

A. That is a fact.

Q. Has the Bureau interpreted that preference requirement as requiring it to give preference to municipalities, government agencies, over privately owned public utility corporations?

A. That is a fact.

Q. Is it a fact that Sierra Pacific Power Company, in endeavoring to purchase power from the United States Bureau of Reclamation, would have to take second place to any municipalities or government corporations applying for such power?

A. Yes.

* * * * * * *

[387]

Mr. Searls: May I refresh the witness' recollection by a reference to Exhibit No. 12?

Presiding Examiner: Certainly.

[388]

Mr. Searls: Which is the transcript of the proceedings on April 15, 1948, before the Public Utilities Commission of the State of California?

Mr. Chanler: What page?

Mr. Searls: On April 15, 1948, on Page 30, Exhibit 12, at the top of the page, Mr. Tracy testified that 1951 was the earliest possible date.

The Witness: Yes.

By Mr. Searls:

Q. And that even that date was dependent upon the Bureau obtaining appropriations?

A. Yes. I think that is the source of the information that I had in my memory but I couldn't show just where I got it.

Q. In your opinion, would a transmission line from the Bureau of Reclamation's Shasta Power Plant to the Sierra Pacific Company, supplied only from the Bureau's plant at Shasta, have been a reliable source of power for Sierra Pacific Power Company?

A. It certainly would not have been as reliable as the source of power from the 75-odd plants from the Pacific Gas and Electric Company.

Q. Is it not a fact that under adverse water condi-

[389]

tions which occur occasionally in California, that // there could very well have been insufficient power generated at

Shasta to have made power available for a customer such as Sierra Pacific Power Company?

A. It is possible, I think, under certain very serious conditions.

Q. Mr. Pollard, yesterday in response to a question from Mr. Chanler, you read from Exhibit 17 the opinion of the California Public Utilities Commission in 1952, in the paragraph beginning at the bottom of the page, that that "the Commission, in considering these special contracts, is of the opinion that an opportunity should be afforded the parties to renegotiate these contracts, should they so determine."

A. Yes, sir.

Q. Following the rendering of the opinion from which I have just quoted, and in response to that statement of the Commission and the order which it made, did the Pacific Gas and Electric Company attempt to renegotiate its contract with Sierra Pacific Power Company?

A. Yes.

Q. With what result?

A. That Sierra Pacific said that Mr. Tracy, upon whom Mr. Sutherland, the general manager of Pacific Gas and Electric Company, and myself called to discuss the matter,

[390]

stated that he was one of the parties and he // didn't so determine.

Presiding Examiner: Will you read that?

(Answer read.)

By Mr. Searls:

Q. What did you understand that he meant by that?

A. That he was not willing to renegotiate.

Presiding Examiner: Was it as brief as all that?

The Witness: Oh, no. We spent over half a day with Mr. Tracy on that occasion and discussed the matter at some length. He just stated that he didn't think he was required by this order to renegotiate because the order said if the parties desire—and that meant both parties. That was his position.

* * * * * * *

[394]

By Mr. Searls:

Q. In that letter a suggestion is made for a 15-year contract. Will you state why the proposal was made for a 15-year contract?

A. The reason for the 15-year contract was to be assured of sufficient revenue over a long enough period of time to justify the investment in the additional facilities that we would have to supply under the contract.

James F. Pollard

upon being recalled as a witness on re-direct examination, having been previously sworn, testified under re-cross examination as follows:

* * * * * * *

Examination by the Presiding Examiner:

* * * * * * *

[425]

Presiding Examiner: Yes, I want to know, because you have opened up a line that has been in my mind but I have been waiting for counsel to conclude. Who were present at the conference you had in November 1952 with Mr. Tracy? Who besides yourself?

The Witness: November 1952?

Presiding Examiner: Yes, sir.

The Witness: That was after—

[426]

Presiding Examiner: Never mind when it was after. You stated that you had the conference in November 1952.

The Witness: Mr. N. R. Sutherland, our general manager and vice president.

Presiding Examiner: You and Mr. Sutherland?

The Witness: Yes, sir.

Presiding Examiner: Who were present for Sierra?

The Witness: Mr. Tracy, Mr. Barnett, Mr. Armstrong, and I think Mr. Devore.

Presiding Examiner: You have testified that that conference was for the purpose of renegotiating the contract which is on file with Federal Power as rate schedule No. 3?

The Witness: Yes.

Presiding Examiner: And that it lasted a number of hours?

The Witness: Yes.

Presiding Examiner: And that it was ineffective?

The Witness: Yes.

* * * * * * *

James F. Pollard

having been previously sworn as a witness and having testified under cross-examination of Mr. Wahrenbrock, testified under re-direct examination as follows:

* * * * * * *

Re-Direct Examination by Mr. Searls:

[451]

* * * * * * *

Q. In your opinion would such a discussion during that period have produced any result?

A. No, I think not.

Q. Why do you say that?

The Witness: Oh, no. We spent over half a day with Mr. Tracy on that occasion and discussed the matter at some length. He just stated that he didn't think he was required by this order to renegotiate because the order said if the parties desire—and that meant both parties. That was his position.

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[426]

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* * * * * * *

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* * * * * * *

Re-Direct Examination by Mr. Searls:

[451]

* * * * * * *

Q. In your opinion would such a discussion during that period have produced any result?

A. No, I think not.

Q. Why do you say that?

A. At our meeting with Mr. Tracy in November he made it very clear to us—at least we thought he made it very clear to us—that he would not considered any voluntary renegotiation of the contract as suggested as a possibility by the California Commission in its decision. I might add that therefore we didn't consider that there would be anything gained by any further discussions of the matter before filing the supplement No. 1.

* * * * * * *

[622]

Frank A. Tracy

was called as a witness, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Chanler:

Q. What is your full name, Mr. Tracy?

A. Frank A. Tracy.

Q. What is your position with the Sierra Pacific Power Company?

A. President and director of the company.

Q. How long have you held that office?

A. Since 1942.

Q. How long with the company?

A. Since 1940.

Q. Where do you live?

[623]

A. Reno, Nevada.

Q. Have you lived there during this period?

A. All the time, yes, sir.

Q. As part of your duties as president and director during this period, it has been your responsibility, has it not, to consider the supply of power which was available to Sierra?

A. It has been, yes.

* * * * * * *

[626]

Q. If you will turn now to page 6, the next page of Mr. Pollard's memorandum, to refresh your recollection—page 6 of the entire exhibit—did you have discussions with Mr. Pollard regarding the rate that you were at that time paying to Pacific Gas and Electric under your existing contract which is the contract of 1938?

[627]

A. Yes, we did. We were complaining that the rate we were paying at that time was too high and that we had considerable pressure on us in the community because of being accused of having high power costs that were keeping industry out of the area.

Q. When you say "the community," who do you mean?

A. I mean the communities we serve in Northern Nevada, particularly.

* * * * * * *

[636]

Q. The next problem would have been in 1949 and 1950?

A. That is true.

Q. And according to your studies it was possible that

[637]

the then facilities of Pacific Gas and Electric would // be inadequate to meet your load as of that date, is that right?

A. I think the 1949 peak entered into that too.

Q. The anticipated 1949 peak?

A. That is right.

Q. The two problems, as to the solution of which you were having difficulties with Pacific Gas and Electric?

A. That is true.

637

Mr. Chanler: Do you wish me to develop it further?

Mr. Searls: No.

By Mr. Chanler:

Q. Now, turning to Exhibit 21, I ask you to look at page 8, Exhibit 21, a letter to you dated January 23, 1947, signed R. S. Calland.

Mr. Chanler: I would like to state to counsel I have the original file here also which I will be glad to show you during the recess if that is agreeable.

Mr. Searls: Surely.

By Mr. Chanler:

Q. I call your attention to the first line "Dear Mr. Tracy: Reference is made to your letter dated December 17, 1946 wherein it stated," and so forth. Now, if you will turn to page 1, the first letter of the exhibit is dated on this copy December 17, 1948, is it not?

A. It is.

[638]

Q. And it refers immediately to a memorandum relating to a conference at your office on December 12, 1946?

A. That is right.

* * * * * * *

[671]

Q. You said there was a great deal of agitation among your customers and others in Nevada to the effect that you should deal with the Bureau.

You attended the hearing, did you not, before the California Public Service Commission at which this contract was presented for approval?

A. I did, yes.

Q. One of the conditions of this contract was, was it not, that before it should become effective it should first be approved and the parties thereto authorized to carry it out by the California Commission, isn't that right?

A. That was so stated, yes.

Q. And you attended that hearing?

A. Yes.

Q. And there opposition to the contract and arguments in favor of still going on with the Bureau, were presented by a representative of Nevada, were they not?

A. That is true.

Q. Did you at that hearing defend this contract?

A. I did, as a good contract, and the opposition at that time, as I have stated before, was respresentative

of organizations such as the retail merchants association of Reno, Chambers of Commerce of the various cities served by our company, city officials themselves of the major cities, county officials, state commission, utility commission, state engineers' office, all appeared either in person or by representative at that hearing, and the hearing was finally brought to a conclusion and the Commission gave a certain period of time for the opposition to further study the contract, as they said they wanted to be sure that Northern Nevada was getting a good deal.

Q. You say that you had presented all the arguments that you could think of as to why the contract was a good contract?

A. All of my arguments in the 1948 hearing were to that end.

Q. And your counsel's arguments, too, is that right?

A. That is true.

Q. And was the result of this that the opposition finally —the formal opposition at that time—withdrew opposition to the approval of the contract?

A. That is right.

Q. It was withdrawn some time after the hearing, was it not?

A. That is right.

[673]

Q. But actually there continued to be agitation on // this subject?

A. The agitation did not stop at that time, but it took a different angle. Naturally we had our contract with Pacific Gas and Electric Company, and from our standpoint we made the plain statement that we could not buy government power or enter into any contract for purchasing government power, and the angle pursued from then on, for some period of time, was getting individual contracts or promises of contracts with various cities for power for their own use.

Presiding Examiner: Who was doing that?

The Witness: The cities themselves—the city officials and working through the Colorado River Commission, and some time later in 1948 there was a meeting in Carson City which I believe Mr. Devore will mention that will bear out that statement.

* * * * * * *

Frank A. Tracy

upon being recalled as a witness on direct examination, having been previously sworn, testified under cross-examination as follows:

* * * * * * *

Cross-Examination by Mr. Wahrenbrock:

* * * * * * *

[901]

Q. And you signed the 1948 contract with the provision

This material will be found at pp. 663-666 of this volume.

819 - 824

This material will be found at pp. 663-666 of this volume.

which appears in paragraph 12 on the last page of Exhibit 1, which by its terms subjects the agreement to such changes and/or modifications as the California Commission

[902]

may from time to time direct in the // exercise of its jurisdiction, without legal advice as to what its jurisdiction or this Commission's jurisdiction was, is that correct?

A. As I say, the case was Pacific Gas & Electic's case and I signed the contract on the legal advice that it was perfectly all right to sign it.

Mr. Wahrenbrock: I am sorry. That is not quite responsive to the question that I do desire to have a responsive answer to, if I can.

Would the reporter read the question?

(Question Read.)

A. I think the answer is: I certainly signed the contract.

By Mr. Wahrenbrock:

Q. And did so without legal advice as to what the jurisdiction of the California Commission was with respect to this rate?

A. That would have to be asked the attorney. I signed it on the advice of an attorney.

Q. My question is whether you had legal advice as to what the jurisdiction of the California Commission was?

A. If you call the legal advice the fact that they told me that it wasn't a question that I should consider I will say that they did give me advice.

[903]

Q. The only advice you had that has any possible relationship to the question that I have been pressing is such advice as was implicit in your attorney's recommendation to you that you sign this contract, is that correct?

A. He advised me that the contract was in proper form to sign, yes, sir.

Q. But you have no recollection now of being advised by him, or being advised by any of your attorneys, at that time—at the time you signed—as to whether this sale was or was not subject to the jurisdiction of the California Commission?

A. The question was not raised at the California Commission hearing. I had no—

Mr. Wahrenbrock: Please

The Witness: I am trying to answer the question.

Mr. Wahrenbrock: Not whether it was raised before the California Commission.

Read my question again, please.

(Question read.)

A. I still can't see how I can answer yes or no on that, Mr. Wahrenbrock, under the circumstances. I mean the advice that I was given and the fact that it wasn't a point before the hearing. How could I answer yes or no?

By Mr. Wahrenbrock:

Q. Did you believe that the California Commission had jurisdiction over this rate?

A. Do you want my personal opinion, is that what you would like to have me answer?

Q. Did you at that time believe that the California Commission had jurisdiction?

A. I had every reason to believe that every contract before that had been approved by the California Commission, yes, sir.

* * * * * * *

Frank A. Tracy

having been previously sworn as a witness and having testified under cross-examination, testified under re-direct examination as follows:

Re-Direct Examination by Mr. Chanler:

* * * * * * *

[978]

Q. Mr. Tracy, at the time that you were considering the January 22, 1947 proposal made by Pacific Gas and Electric to the effect that they would not build the extra line, the new line, unless they got a 15-year contract at existing rates with a fuel escalator clause, you were confronted during that entire period by pressure from your customers to get lower rates, were you not?

A. That is right, yes, sir.

* * * * * * *

George G. Devore

upon being recalled as a witness, having been previously sworn, testified under cross-examination as follows:

* * * * * * *

Cross-Examination by Mr. Searls:

* * * * * * *

[1025]

Q. Mr. Devore, was it not a fact that Sierra Pacific Power Company, in the latter part of 1947 and the early part of 1948, prior to the execution of the 1948 contract, was faced with the unescapable fact that it would have to commit itself to a substantial expenditure or undertaking

[1026]

of some kind, whatever method it used to assure itself of an adequate supply of power for the future?

A. Based on the assumption that the Pacific Gas & Electric Company would make available more capacity at the Donner Summit that would follow.

Q. That was true, too, with respect to your assumption that the Bureau of Reclamation power would be delivered to Sierra Pacific at any of the locations you have mentioned?

A. That is also true.

Q. I am not sure that the record is clear but you did not mean to say, did you, that Sierra Pacific could have, with the lines in existence in 1947, taken 70 to 80 thousand kilowatts of energy at Donner Summit?

A. I don't recall that I made that statement.

Q. I thought the record was a little bit uncertain. At that time there were only the two 60 kv lines in existence, is that right?

A. In 1947, that is correct.

Q. That was true also in 1948 and most of 1949 so far as operation was concerned?

A. Yes. I think it was in December or January when Pacific Gas & Electric completed there, and the Sierra Pacific line was completed without the substation.

Q. In evaluating the possibility of obtaining // power from the Bureau of Reclamation you were relying upon the draft contract for electric service to Colorado River Commission of Nevada, preliminary draft dated October 21, 1947—it begins with page 11 of Exhibit 21—were you not?

A. Not in the exact form that they have it there. That was a preliminary draft, as I understood it.

Q. What departures from that did you have in mind?

A. At that time I didn't study it very much but I recall that in reading it over there were a number of features in it that we would have wanted modified.

Q. Was one of those a provision that the Bureau of Reclamation could have some authority in the determination of retail rates of Sierra Pacific Company?

A. I don't recall that that was in the contract as submitted.

Q. If that was in there would that have been acceptable to Sierra Pacific?

A. Not desirable, I would say, depending upon the control that they wished to exercise.

Q. You were aware, I take it, that the draft contract which has just been mentioned contains a provision in clause 16 on—it is page 24 of Exhibit 21 page 12 of the contract—that the Bureau of Reclamation will be excused if there was

[1028]

an inadequacy of water for the // generation of the electric power and energy contracted for in that contract?

A. Yes. I was aware of that.

Q. Was that provision acceptable to Sierra Pacific from your point of view?

A. I don't think there was any choice of that provision under the then existing conditions.

* * * * * * *

[No Number]

* * * * * * *

Oral Argument before the Federal Power Commission

* * * * * * *

REPLY ARGUMENT ON BEHALF OF SIERRA PACIFIC POWER COMPANY

* * * * * * *

[1455]

Mr. Chanler: And we in doing so, Mr. Draper, relied on the express testimony of Mr. Beckett, their rate engineer, when he was testifying before the California Commission and promulgating this very P-31 rate. And they said to him, "What is the purpose of the term?"

"One of the purposes is to give the customer the assurance that he will have service at this lower rate for a period of at least five years under a five-year contract."

That's what they told us. It's what we believed. And I'm quite sure the Court of Appeals for the Third Circuit down here is going to tell you that's what the law is, sir. We had a perfect right to rely on it, in any event. We believed it was what we were going to get, and I believe we will.

Now, I have brought out the fact that a comparison between the P-31 and the direct sale was made and was discussed. He says these exhibits I have weren't testified to

[1456]

by anybody. // Well, they do speak for themselves. They are Mr. Black's notes and memoranda and rate studies. And if they want Mr. Sutherland's testimony about them, he's their vice president, and I believe he is still available if they want him to testify. I'm not responsible for this.

[1577]

Pacific Gas and Electric Company
San Francisco, California.

Revised Sheet C.R.C. No. 709-E
Canceling Revised Sheet C.R.C. No. 662-E
(Effective June 15, 1936)

SCHEDULE P-6

Resale Power

Description of Service:

This schedule is applicable to electric energy supplied to other electric utilities and to municipalities for distribution and resale where such utilities or municipalities take their entire electric energy supply from the Company.

Territory:

The entire territory served except Humboldt and Coast Valleys Divisions, North Bay Division north of Santa Rosa, and Shasta Division north of Montgomery Creek.

Rate (A):

Service at 2200 volts up to and including lines of 25,000 volts.

(1) Demand Charge

First 50 kw. or less of maximum demand	$90.00 per month
Next 150 kw. of maximum demand	1.50 per kw.
Next 300 kw. of maximum demand	1.00 per kw.
Next 500 kw. of maximum demand	.75 per kw.
All over 1000 kw. of maximum demand	.60 per kw.

plus

(2) Energy Charge (to be added to the demand charge)

First 150 kwh. per kw. per month	.80¢ per kwh.
Next 170 kwh. per kw. per month	.54¢ per kwh.
All over 320 kwh. per kw. per month	.45¢ per kwh.

Rate (B):

Service at line voltages in excess of 25,000 volts.

(1) The rate is the same as that set forth under (A) above with the demand charge decreased by 15 per cent and the energy charge by 3 per cent.

Discounts:

The above rates (A) and (B), except for the last two energy blocks, are subject to a special discount allowed to assist in developing rural territory equal to 10 per cent times the ratio of the purchasing companies' kwh. sales for service rendered in rural (unincorporated) territory to the total kwh. sales. The discount to be applied for any calendar year will be based on the previous year's sales of the resale utility.

Special Conditions:

(a) Optional Rate

Service to loads of less than 50 kw. demand may, at the option of the consumer, be billed under Schedule P-1, or Schedule P-15.

(b) Voltage

Service under Rate (A) will be supplied by the Company at standard voltages of 2200 volts or more up to and including 25 k.v. lines at the consumers' option.

Service under Rate (B) will be supplied by the Company at its standard line voltages as available above 25 k. v.

(c) Demand

The maximum demand in any month will be the average kilowatt delivery of the thirty minute interval in which the consumption of electric energy is greater than in any other thirty minute interval in the month. The maximum demand on which the demand charge and energy block will be based will not be less than 60 per cent of the greatest maximum demand occurring during the eleven preceding months.

Any demand occurring between the hours of 11:00 P.M. and 6:00 A.M. of the following day will not be considered in computing the charges under this schedule.

(d) Power Factor

The total charge for any month as computed on the above rates will be decreased or increased, respectively, by 0.25% for each 1% that the average power factor of the customer's load in that month was greater than 85% or less than 75%, such average power factor to be computed (to the nearest whole number) from the ratio of lagging kilovolt-ampere-hours to kilowatt-hours consumed in the month.

Date Issued August 2, 1937. Date Effective September 1, 1937.
Issued and approved by Paul M. Downing
Vice-President and General Manager
San Francisco, California
Issued under Special Permission of the Railroad Commission of the State of California No. 3F0809-709-E

[1578]

Pacific Gas and Electric Company
San Francisco, California.

Revised Sheet C.R.C. No. 797-E
Canceling Revised Sheet C.R.C. No. 709-E
(Effective September 1, 1937)

SCHEDULE P-6

Resale Power

Description of Service:

This schedule is applicable to electric energy supplied to other electric utilities and to municipalities for distribution and resale where such utilities or municipalities take their entire electric energy supply from the Company.

Territory:

The entire territory served except the San Joaquin Power, Humboldt and Coast Valleys Divisions, North Bay

Division north of Santa Rosa, and Shasta Division north of Montgomery Creek.

Rate A:

Service at 2200 volts up to and including lines of 25,000 volts.

(1) Demand Charge:

First 50 kw. or less of maximum demand	$90.00 per month
Next 150 kw. of maximum demand	1.50 per kw.
Next 300 kw. of maximum demand	1.00 per kw.
Next 500 kw. of maximum demand	.75 per kw.
All over 1000 kw. of maximum demand	.60 per kw.

plus

(2) Energy Charge (to be added to the demand charge):

First 150 kwh. per kw. per month	.80¢ per kwh.
Next 170 kwh. per kw. per month	.54¢ per kwh.
All over 320 kwh. per kw. per month	.45¢ per kwh.

Rate (B):

Service at line voltages in excess of 25,000 volts.

The rate is the same as that set forth under (A) above with the demand charge decreased by 15 per cent and the energy charge decreased by 3 per cent.

Discounts:

The above rates (A) and (B), except for the last two energy blocks, are subject to a special discount allowed to assist in developing rural territory equal to 10 per cent times the ratio of the purchasing companies' kwh. sales for service rendered in rural (unincorporated) territory to the total kwh. sales. The discount to be applied for any calendar year will be based on the previous year's sales of the resale utility.

Special Conditions:

(a) Optional Rate:

Service to loads of less than 50 kw. demand may, at the option of the consumer, be billed under Schedule P-1, or Schedule P-15.

b) Voltage:

Service under Rate (A) will be supplied by the Company at standard voltages of 2200 volts or more up to and including 25 k.v. lines at the consumers' option.

Service under Rate (B) will be supplied by the Company at its standard line voltages as available above 25 k. v.

(c) Demand:

The maximum demand in any month will be the average kilowatt delivery of the thirty minute interval in which the consumption of electric energy is greater than in any other thirty minute interval in the month. The maximum demand on which the demand charge and energy blocks will be based will not be less than 60 per cent of the greatest maximum demand occurring during the eleven preceding months.

Any demand occurring between the hours of 11:00 P.M. and 6:00 A.M. of the following day will not be considered in computing the charges under this schedule.

(d) Power Factor:

The total charge for any month as computed on the above rates will be decreased or increased, respectively, by 0.25% for each 1% that the average power factor of the customer's load in that month was greater than 85% or less than 75%, such average power factor to be computed (to the nearest whole number) from the ratio of lagging kilovolt-ampere-hours to kilowatt-hours consumed in the month.

Date Issued June 15, 1939.
Date Effective July 1, 1939.
C. R. C. Decision No. 32106

Issued and approved by Paul M. Downing
Vice-President and General Manager
San Francisco, California

[1579]

Pacific Gas and Electric Company
San Francisco, California

Original C.R.C. Sheet No. 1197-E

SCHEDULE P-31

Resale Power

(Optional with Schedule P-6)

Description of Service:

This schedule is applicable, on contract for periods of 5 years, to electric energy supplied at standard voltages of 2200 volts or over, to other electric utilities and to municipalities for distribution and resale where such utilities or municipalities take their entire electric energy supply from the Company.

Territory:

The entire territory served, except the San Joaquin Power, Humboldt and Coast Valleys Divisions, North Bay Division north of Santa Rosa, Shasta Division north of Montgomery Creek.

Rate (A):

Service at 2200 volts up to and including 25,000 volts.

Demand Charge:

First 50 kw. or less of maximum demand	$75 per month
Next 150 kw. of maximum demand	$1.50 per kw. per month
Next 300 kw. of maximum demand	1.00 per kw. per month
Next 500 kw. of maximum demand	.75 per kw. per month
Next 1000 kw. of maximum demand	.60 per kw. per month
All excess kw. of maximum demand	.40 per kw. per month

Energy Charge (to be added to the Demand Charge):

First 150 kwh. per kw. per month	7 mills per kwh.
Next 150 kwh. per kw. per month	5 mills per kwh.
All over 300 kwh. per kw. per month	4 mills per kwh.

Rate (B):

Service at line voltgages in excess of 25,000 volts.

The rate is the same as that set forth under Rate (A) above with the demand charge decreased by 15 per cent and the energy charge decreased by 3 per cent.

Special Conditions:

(a) Voltage: Service under Rate (A) will be supplied by the Company at standard voltages of 2200 volts or more up to and including 25,000 volts, as requested by the customer.

Service under Rate (B) will be supplied by the Company at standard line voltages above 25,000 volts as available.

(b) Demand: The maximum demand in any month will be the average kw. delivery of the 30 minute interval in which such delivery is greater than in any other 30 minute interval in the month, provided, however, that if the load is intermittent or subject to violent fluctuations a 5 minute interval may be used. The maximum demand to be used in computing charges under the above rates will be the mean of the actual maximum so determined for the current month and the highest such demand occurring in the year ending with the current month.

(c) Off Peak Demand: Any customer served on this schedule may, upon request, have his maximum demand measured by a type of meter which records the demand at all hours, in which case demands occurring between 10:30 P.M. and 6:30 A.M. of the following day and on Sundays and legal holidays will be ignored in determining the demand used for computing charges.

(d) Power Factor: The total charge for any month as computed on the above rates will be decreased or increased, respectively, by 0.25% for each 1% that the average power factor of customer's load in that month was greater or less than 85%, such average power factor to be computed (to the nearest whole per cent) from the ratio of lagging kilovolt-ampere-hours to kilowatt-hours consumed in the month, provided, however, that no power factor correction will be made for any month when customer's maximum demand was less than 10% of the highest in the preceding eleven months.

Advice No. 14-E. Date Filed July 27, 1945—Effective August 27, 1945—Decision No. 38305
Issued by A. Emory Wishon, Vice-President and General Manager

* * * * * * *

[1904]

* * * * * * *

PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

March 25, 1953

Federal Power Commission,
Washington 25, D. C.
Attention: Mr. Leon M. Fuguay, Secretary.

Gentlemen:

We have received the copy of your order, issued March 13, 1953, in Docket No. E-6482, setting a hearing in the matter of Pacific Gas and Electric Company's proposed rate to Sierra Pacific Power Company. As stated in our letter of February 18, the Pacific Gas and Electric Company has filed with this Commission an application for an order revising and referring its electric service contract with Sierra Pacific Power Company, dated March 4, 1948, and directing that new rates and charges be substituted for these shown in the contract.

We are enclosing herewith a copy of our Decision No. 47832 in Application No. 32589, the application of Pacific Gas and Electric Company for authority to increase its electric rates and charges. Said decision is reported at 52 Cal. P.U.C. 111. Mention of Pacific's contract with Sierra was made in said decision, commencing at page 40 of the copy fowarded herewith, under the heading "Special Resale Contracts", and also in Part 3 of the order, commencing at page 46.

It appears that a portion of the electric power and energy sold by Pacific to Sierra under the agreement originates in California, is ultimately delivered and used within California, and at no time crosses state boundaries. The matter of rates and charges applied by Pacific for the delivery of such intrastate power and energy is within the jurisdiction of this Commission. Therefore, this Commission appreciates your courtesy in keeping it advised of developments in your proceeding under Docket No. E-6482.

Very truly yours,

PUBLIC UTILITIES COMMISSION, STATE OF CALIFORNIA
By R. J. PAJALICH
R. J. PAJALICH, Secretary.

Enclosure.

[Docketed Mar. 30, 1953]

[No Number]

Extract from Transcript of Proceeding Before Public Utilities Commission of the State of California in the Matter of

Pacific Gas and Electric Company
Application No. 32589—January 7, 1952

* * * * * * *

Frank A. Tracy

having been first duly sworn, testified as follows:

Direct Examination by Mr. Orrick:

* * * * * * *

[1920]

Q. It was Truckee River Power Company?

9. Truckee River Power Company, yes. The contract covered the purchase of 5,000 kilowatts of power and the power was delivered as of—or began to be delivered as of November 20th, 1923. That contract provided for the building of a 60 KV line to deliver this power into Nevada and that is the line that I mentioned awhile ago as extending from the Spaulding plant of the PG&E Company to the summit where the power was metered and then taken by—or over Sierra Pacific Power Company's line over the state line into Nevada. That contract was for a period of ten years with a five year renewal clause which was taken advantage of, so the contract did run for 15 years.

* * * * * * *

[1924]

Q. Did you inquire of Pacific whether it could furnish you with additional power at that time?

A. We were discussing the power question with Pacific from the time that we agreed upon recoppering of the lines and continued power negotiations with them for a period of over a year.

Q. Did they make you any offer to serve your additional power under different rates commencing about the first of January in 1947?

A. The first proposition made by the PG&E Company was to build a third transmission line to get power into Nevada and to charge rates that were very similar to what we were paying under the '38 contract at that time, but plus the fuel charge. The fuel escalator clause. That was the first offer that was made by the Company.

Q. And did you accept that offer?

A. No, we thought that the rate that we were paying at that time was too high and also that the fuel clause was very impractical for our Company and almost impossible to—actually impractical to operate in our rate system—rate setup.

Q. You thought that the rates contained in their first offer to you in 1947 would be too high if you entered into the contract, is that right?

A. That is right.

Q. And then did you continue negotiations with Pacific?

A. We did.

Q. And you finally reached an agreement that resulted in the 1948 contract, is that correct?

[1925]

A. That is right. // That agreement was signed in March—on March 4th, 1948.

Q. Would you state briefly the terms and conditions of the March 4th, 1948 contract?

A. The contract was for a period of 15 years based on the fact that both the Companies went to considerable investment to get the additional power from the PG&E's system to Nevada. It allowed for the construction of a 110 KV line which I mentioned awhile ago with reference to the map as extending from the Drum power plant of PG&E's by Donner Summit to a point near Verdi, Nevada, but in California, and near the California-Nevada line where the power was metered. Now, the portion of the line of that 110 KV that was constructed and owned by Pacific was from Drum to Donner Summit and the Sierra Pacific Power Company built and owns the 110 KV line from Donner Summit to the so called California Substation. There, as I mentioned, before it was stepped down to 60 KV and the Company built the further extension from the California Substation to its Washoe Substation in the nature of a 60 KV line. The rate under this 1948 contract was similar to PG&E's then P-31 rate.

* * * * * * *

[2162]

United States of America
Federal Power Commission

Before Commissioners:
Thomas C. Buchanan, Chairman, Dale E. Doty,
Claude L. Draper, Nelson Lee Smith and
Harrington Wimberly

In the Matter of
Pacific Gas and Electric Company } Docket No. E-6482

ORDER PERMITTING SIERRA PACIFIC POWER COMPANY TO INTERVENE AND DENYING MODIFICATION OF ORDER SETTING HEARING

Sierra Pacific Power Company (Sierra), by several petitions filed in the above-entitled proceeding, two on March 23 and one on March 30, 1953, requested, among other things, that, (1) it be granted permission to intervene in the instant proceeding wherein the Commission, by order entered March 13, 1953, pursuant to Section 205(e) of the Federal Power Act, suspended the rate increase embodied in Pacific Gas and Electric Company's Supplement No. 1 to its Rate Schedule FPC No. 3 for service rendered to Sierra, and (2) the Commission modify and amend said order so as to reject the proposed rate increase, or if that be denied, to direct that the hearing set by said order be limited to oral argument before the full Commission solely as to the lawfulness of the proposed rate increase under Section 205 of the Act.

The Commission *finds:*

(1) The participation of the petitioners in this proceeding may be in the public interest.

(2) It is appropriate to carry out the provisions of Section 205 of the Act that Sierra's petitions in all other respects be denied.

The Commission *orders:*

(A) Petitioners be and they hereby are permitted to become intervenors in the proceedings herein subject to the rules and regulations of the Commission, provided, however, that the participation of such intervenors shall be limited to matters affecting asserted rights and interests specifically set forth in the petition for leave to intervene, and provided further that the admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved because of any order or orders of the Commission entered in this proceeding.

[2163]

(B) Sierra's petitions in all other respects be and the same hereby are denied, without prejudice to the right of Sierra to maintain its contentions as to the effect of the filing of Supplement No. 1 under Section 205(d) of the Act, and as to the Commission's authority in this proceeding.

By the Commission. Commissioner Draper dissenting.

(Signed) LEON M. FUQUAY,
Secretary

Adopted: April 14, 1953
Issued: April 17, 1953

[2232]

UNITED STATES OF AMERICA

Before the

FEDERAL POWER COMMISSION

Washington, D. C.

In the Matter of
PACIFIC GAS AND ELECTRIC COMPANY

Docket
No. E-6482

Opening Brief of
Pacific Gas and Electric Company

[2233]

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* * * * * * *

[2236]

[Title Commission and Cause omitted]

OPENING BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY

Introduction

Pacific Gas and Electric Company, herein called Pacific, sells power in California to Sierra Pacific Power Company, herein called Sierra, which resells a portion of the power to customers in California and transmits the balance into the State of Nevada for sale there. In this proceeding Pacific seeks authority to increase its rate to Sierra, Schedule F.P.C. No. 3, which has been in effect since 1948. In the test year 1952 Pacific received no more than a 2.60% return from

[2237]

Sierra and the proposed rate would increase Pacific's return from Sierra to not more than 4.75%, far below the 5.5% return stipulated to be reasonable. The proposed rate is substantially identical with (1) Pacific's Schedule F.P.C. No. 6, Supplement No. 1 now in effect for similar service to another company and (2) Pacific's general rate tariff for resale electric service. Sierra's sole basis for contesting the increase is its assertion that the present rate was granted in a competitive situation and therefore must remain unchanged for the life of its service contract with Pacific, a period which may be as long as 30 years. Pacific disputes both Sierra's premise and its conclusion.

I

Description of Service

Pacific owns and operates an extensive electric utility system serving most of northern and central California. Sales to Sierra constitute approximately 1.4% of Pacific's electric load. Sierra owns and operates an electric utility system serving portions of California east of the Sierra Nevada Mountain Range and a large part of the State of Nevada, including the city of Reno. Sierra generates a portion of its own requirements for electric power in five hydroelectric generating plants on the Truckee River having a total capacity of approximately 9,400 kilowatts. With minor exceptions, Sierra obtains the balance of its power requirements by purchase from Pacific. In 1951 Sierra purchased approximately 70% of its energy requirements from Pacific and made almost 90% of its energy sales in Nevada (Ex. 23, pp. 1381, 1382).

The point of interconnection between the two companies is in California at Summit Meter Station at the crest of the Sierra Nevada Range west of Truckee. Pacific supplies power at this point over two 60,000 volt transmission lines, constructed in 1923 and 1938, respectively, and one 110,000 volt line constructed in 1949. All three lines transmit power approximately 27 miles, from Pacific's Drum Power House Substation to Summit Meter Station. In addition, the two 60,000 volt lines may receive energy from Pacific's Spaulding hydroelectric plants adjacent to these lines about 18 miles from Summit. The three Drum-Summit lines pass through a rugged mountainous area and reach an elevation in excess of 7,000 feet. Snow fall in this area is so great at times that portions of the 60,000 volt lines have been buried in snow almost to the pole tops (Ex. 2, p. 7, pictures this condition).

Deliveries of power by Pacific to Sierra are made under Pacific's electric rate schedule F.P.C. No. 3, consisting of a service contract effective as of January 1, 1948 pursuant to authorization by the Federal Power Commission and the California Public Utilities Commission. In addition to specifying the conditions of service and fixing the charges therefor, the contract required Pacific to construct the 110,000 volt line which was completed in 1949, to furnish additional capacity to Sierra. It was necessary for Sierra to install a substation to step the voltage on the new line down to 60,000 volts for use on its system and the contract requires Pacific to compensate Sierra for the annual charges on this substation, up to $30,000 a year. The initial term of the contract was for 15 years, commencing with completion of the 110,00 volt line. If a further increase in capacity is

required by Sierra's load, Pacific has agreed in this contract to construct a second 110,000 volt line, in which event the term of the contract will be extended until 15 years after completion of the second 110,00 volt line.

In the period since establishment of Schedule F.P.C. No. 3 Pacific has, with the authority of the California Public Utilities Commission, twice increased its general electric rates. The first increase effected a six percent increase in gross revenues, effective in April 1950. The second increase, effective in November 1952, was designed to increase gross revenues about 18½%.

On the ground that Sierra should share the burden of rising costs which were responsible for these general rate increases this proceeding was instituted on February 2, 1953.

II

Pacific Is Entitled to the Requested Increase in Revenue to Raise the Unreasonably Low Rate of Return on Capital Allocated to Service to Sierra.

A. The Return Under Both Present and Proposed Rates Is Far Below That Stipulated to Be Reasonable.

Pacific's rate of return on capital allocated to service to Sierra was derived by two methods. Pacific presented in

Exhibit 4 the method adopted by its engineers. Later in the course of the hearing Pacific's engineers prepared and presented Exhibit 19, following a method requested by the Commission Staff. Both methods showed that with the proposed rate increase in effect Pacific would still receive less than the stipulated reasonable rate of return for Pacific's electric department. Neither the Staff nor Sierra made any presentation on this subject.

[2240]

Both Pacific and the Staff use as a rate base original cost of electric plant in service, less recorded depreciation reserve balance applicable thereto, plus an allowance for working capital. Both use 1952 as a test year based on actual operating results as recorded on Pacific's books. Adjustment of such results to account for departures from average year conditions of temperature and precipitation would, in the opinion of Pacific's witness, have reduced the indicated rate of return.

The major portion of the difference between the rates of return developed by the two exhibits results from difference in treatment of Pacific's three Drum-Summit transmission lines, representing an original investment of almost $2,000,000, used almost exclusively for service to Sierra. Pacific allocated directly to Sierra substantially all of the capital invested in these lines and the related operation and maintenance expenses. In addition, Pacific allocated to Sierra on a demand basis approximately 1.4% of its integrated production and transmission network (excluding from the network the three Drum-Summit lines). The Staff, on the other hand, merely included these facilities as a part of the integrated production and transmission network, approximately 1.4% of which was allocated to Sierra on an energy basis. A comparison of the end results of the two methods is presented in the following table:

[2241]

Table I

Comparison of Results of Pacific and Staff Methods

Rate Base, Revenue and Return Derived for Service to Sierra

	Pacific's Method	F.P.C. Staff Method
Rate Base	$10,529,415	$8,489,633
Present Rate:		
Revenue	$ 1,228,138	$1,228,138
Return	$ 86,231	$ 220,642
Rate of Return	0.82%	2.60%
Proposed Rate:		
Revenue	$ 1,570,893	$1,570,893
Return	$ 330,506	$ 403,283
Rate of Return	3.14%	4.75%

The parties stipulated (T. 675)* for the purposes of this proceeding that the facts would support a Commission finding that 5½% is a reasonable rate of return for Pacific's electric department on a net investment rate base. Since the indicated rate of return on net investment allocated to service to Sierra is, under the proposed tariff, only 3.14% by Pacific's method and only 4.75% by the Staff's method it is clear that the proposed tariff is reasonable from the rate of return standpoint.

Comparing the revenue from Sierra at present and proposed rates with the cost of service developed by either method demonstrates that Sierra presently enjoys an unreasonable low rate and even under the proposed rate will not pay the full cost of service. The amounts and per cent of the deficiency under each method are shown in the following table:

---

*References thus are to pages of the transcript of the hearing on this matter.

[2242]

Table II

Comparison of Revenue and Cost of Service for Sierra

	Pacific's Method	F.P.C. Staff Method
Cost of Service	$2,296,508	$1,711,088
Present Rate:		
Revenue	$1,228,138	$1,228,138
Deficiency	$1,068,370	$ 482,950
Per cent deficiency	42%	28%
Proposed Rate:		
Revenue	$1,570,893	$1,570,893
Deficiency	$ 725,615	$ 140,195
Per cent deficiency	32%	8%

The foregoing table shows that the proposed rate increase, amounting to $342,755 when applied to 1952 sales, would reduce the deficiency from 42% to 32% as computed by Pacific, or from 28% to 8% computed by the Staff's method. The latter two percentages, it should be emphasized, represent the deficiencies in gross revenue below that required for the stipulated reasonable 5½% return. The actual net return to Pacific, at a 2.6% rate (Staff method) on 1952 sales, was 53% below the reasonable return and even with the proposed rates the return of 4.75% (Staff method) would be 14% below the reasonably allowable return.

It is Pacific's position that the method requested by the Staff for deriving rate of return is erroneous in many respects, and results in a rate of return much higher than that properly attributable to service to Sierra. Even so, it is submitted that the Staff results demonstrate that the present rate to Sierra is unreasonably low and that the proposed rate still falls short of producing a reasonable rate of return. Discussion and argument with respect to the differences between the two methods is therefore omitted from this brief but tabular comparisons of the two developments of rate base, cost of service and rates of return, with notes as to the points of difference, are presented in the Appendix hereto.

B. The Proposed Rate Increase to Sierra Will Not Increase the Over All Earnings of Pacific's Electric Department Above the Amount Permitted as a Reasonable Return by the California Public Utilities Commission.

In this proceeding the Commission is not directly concerned with the sales beyond its jurisdiction which constitute the major portion of Pacific's electric utility business. However, it should be pointed out that the increase here proposed has actually been taken into account by the California Public Utilities Commission in fixing the general level of rates for purely intra-state sales. As its decision (Ex. 17, pp. 41, 42), issued in October 1952 shows, that Commission assumed that Pacific's revenue from Sierra was based on the rate here proposed and not on the present rate.[1] The revenue which Pacific was authorized to obtain from its other customers was actually reduced by the amount of the increase which Pacific now requests from Sierra. Thus Pacific's electric department operations will earn, over all, no more than a reasonable return if this increase is authorized.

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[1] The Commission's erroneous (we believe) failure to authorize the actual increase to Sierra immediately is discussed later in this brief.

III

The Proposed Rate Increase Will Not Be Unduly Discriminatory or Preferential.

A. The Proposed Rate Is Substantially the Same as Pacific's Only Other Effective Electric Rate Schedule for Firm Service Subject to Federal Power Commission Jurisdiction.

The California Oregon Power Company, herein called Copco, and Sierra are the only customers of Pacific which purchase electric power on a firm basis for resale outside the state of California. They are also the only firm resale customers which have generating facilities of their own. Copco is served under Pacific's schedule F.P.C. No. 6, Supplement No. 1, which became effective as of November 10, 1952 pursuant to an order of the Federal Power Commission issued February 26, 1953 (Ex. 6).[2] This Copco rate is identical with the proposed rate for Sierra in the demand and energy charges and in most of the conditions of service.

Pacific supplies by far the major portion of Sierra's demand and energy requirements and, in addition, stands by to pick up 4,000 kilowatts of the load normally carried by Sierra's 9,400 kilowatts of hydroelectric generating capacity. Compensation for the standby service was negotiated with Sierra as a flat $30,000 annual charge, subject to adjustment if the actual standby requirements should change.

Pacific supplies only a minor part of Copco's power requirements and has contracted to supply not more than 15,000 kilowatts on a firm basis. In order to assure Pacific of a reasonable load factor for this service the Copco rate schedule provides for a minimum charge based on a demand of 15,000 kilowatts at a 40% load factor. Without the minimum charge Copco would be able to take power at a very low load factor and pay for it under a rate designed for resale customers who purchase at their system load factors.

---

[2] Copco is also supplied with power for resale under Pacific's schedule F.P.C. No. 7 at a different point of delivery but this schedule does not now provide for firm service.

The standby charge in the proposed Sierra rate and the minimum charge in the existing Copco rate serve a similar purpose: to adapt the rate to the fact that each of these companies has generating facilities of its own and may purchase increments of power at load factors for which the demand and energy rates were not designed. The demand and energy charges, however, are basic to both contracts and should be identical, as Pacific proposes, since they will normally be the basis of the charges for power actually sold.

B. The Proposed Rate Is Substantially the Same as Pacific's Regular Tariff for Intra-State Resale Customers.

Pacific serves six resale customers (T. 408) on its Schedule R (Ex. 8, p. 4) which was placed in effect November 10, 1952, for service to intra-state resale customers by authority of the California Public Utilities Commission. Schedule R is applicable for service to all resale customers which purchase their entire power requirements from Pacific. The rate proposed for Sierra is simply Schedule R with the addition of a standby charge of $30,000 for the reasons described above. The demand, energy, and minimum charges and the discounts in the proposed Sierra rate are identical with those in Schedule R.

C. The Differences Between the Proposed Rate and the Charges Under Special Contracts with Pacific's Other Resale Customers Are Justifiable and Reasonable.

The balance of Pacific's resale customers consists of 12 municipalities, one utility district and one cooperative served under special contracts (T. 547-554).[3]

Nine of these customers, including the cities of Alameda, Biggs, Gridley, Lodi, Palo Alto, Roseville and Santa Clara, the Plumas-Sierra Electric Cooperative and Sacramento Municipal Utility District are served under contracts which contain rates substantially the same as the present rate to Sierra. However, no standby charge is required since none of these customers has generating facilities of its own. These special contracts do not contain what is known as the "ratchet clause" which provides that the demand charges shall be based on the average between the current month's demand and the highest demand during the 12 months ended with the current month. The elimination of the "ratchet clause" has the effect of reducing slightly the total charges for power to these customers. All of these nine customers, with the exception of the cooperative, are within the so-called "wheeling area" shown on the map in Exhibit 25. Pacific has agreed with the Bureau of Reclamation to wheel power supplied by the Bureau from its Shasta and Keswick plants to preference customers within the "wheeling area." Preference customers include municipalities and public districts but not privately owned public utilities such as Sierra.

---

[3] The City and County of San Francisco and Turlock Irrigation District are eliminated from consideration since they involve sales of small amounts of power to supplement in an irregular manner the hydroelectric generation of these two customers.

The three cities of Healdsburg, Ukiah, and Lompoc, all of which are outside the "wheeling area," are served under contracts similar to the preceding group of nine customers, but with charges at a slightly higher level.

The City of Redding, which is adjacent to the Bureau of Reclamation's Shasta and Keswick hydro plants, is in a class by itself since it receives a special discount of 10% under the charges for the group of nine customers first mentioned. Otherwise its contract is similar to those of the other municipalities.

The proposed rate for Sierra will be substantially higher than the rate to any of the 13 customers just described. The difference in rate levels reflects the unreasonably low rates in the special contracts. Pacific is endeavoring to eliminate or reduce the difference by raising the special contract rates. As appears from Exhibit 17 (pp. 40-42), the decision of the California Public Utilities Commission on Pacific's application for a general rate increase, Pacific requested authority to increase the charges under all of these special contracts except that with the City of Redding. The California Commission held, in effect, that Pacific was entitled to receive revenue at Schedule R rates (equivalent to the proposed Sierra rate) from these customers and in fixing Pacific's general rates actually assumed that such revenue was received. However, for reasons which will be discussed later in this brief, the Commission refused authority to increase the special contract rates but directed Pacific to attempt to obtain such increase by negotiation with the customers. Pacific is endeavoring to negotiate such increases but thus far has been unsuccessful. All of these contracts except one will have expired by the end of 1955 and the one exception will expire in 1956, so the possible loss of revenue from these special contracts in the event that they run their course without a change in rates is relatively limited as compared with the Sierra contract which will run at least until 1964 and possibly until 1979.

D. The Proposed Rate to Sierra Is Substantially Pacific's Standard Resale Rate Which Should Be Applied to All Resale Customers.

To sum up the foregoing, the rate proposed for Sierra is, in essence, identical with Pacific's tariff for all resale customers not under special contract and has been recognized by the California Commission as an appropriate rate for Sierra and all of the special contract resale customers. Sierra has virtually conceded that the rate of return which Pacific will receive under the proposed increase is reasonable and has not disputed the reasonableness of the general resale schedule.[4] The sole contention made by Sierra, as we understand it, is that the present rate is embodied in a contract having a term which may extend for a total period of 30 years and that the present rate must remain unchanged for the entire period. The following section of this brief will deal with this issue.

IV

Pacific's Contract to Serve Sierra Will Be Just and Reasonable with the Proposed Rate Increase in Effect

It is a fundamental principle of law that a contract for public utility service is subject to change in all its aspects

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[4] The California Commission, in fixing Schedule R, noted that a cost of service study, made for Pacific, "shows that [Pacific's] proposed resale revenues are roughly 35% below the indicated 1952 cost of rendering the service."

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by a regulatory body having jurisdiction. *Union Dry Goods Co. v. Georgia P.S. Corp.,* 248 U.S. 372. Indeed, where such a contract becomes unduly discriminatory or preferential, as is the case here, it is the duty of the public utility to eliminate the discrimination or preference. *Pennsylvania W. & P. Co. v. Consolidated G. E. L. & P. Co.,* 184 F.2d 552, 567, cert. den. 340 U.S. 907. No agreement or representation by a public utility or its customers can circumscribe the Commission's authority in this respect.

Sierra's contention, however, is squarely opposed to these principles. Sierra claims, in effect, that this Commission may not authorize Pacific to increase its rate to Sierra for the entire period of its service contract, which may extend over thirty years. This claimed extreme limitation on the rate determining powers of this Commission is based on Sierra's assertion that Pacific agreed or represented that the rate was fixed for the contract term. Pacific made no such agreement or representation, nor could it do so legally. If Sierra's contention were correct then a public utility could grant a preferential rate to any customer by simply including in its service contract a provision that it would not increase the rate for the contract term. But the service contract with Sierra contains no such provision and it is certain that the prohibitions of Section 205(b) of the Federal Power Act cannot be so easily avoided. That section in categorical terms provides that "No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission (1) make or grant any undue preference or advantage to any person. * * *"

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The Federal Power Act, in Sections 205(a), 205(e) and 206(a), clearly requires the Commission to judge each rate solely according to the standard of whether it is "just and reasonable." No other rate is lawful.

The preceding portion of this brief has reviewed the evidence which established the reasonableness of the proposed charges. The only question which can remain is whether the proposed schedule, considering the charges and the service contract as a whole, meets the "just and reasonable" test. We do not understand that Sierra requests or desires any change in the terms of the service contract, nor that Sierra claims that any of those terms are unreasonable. It appears to be the position of Sierra, however, that taking the contract together with the proposed charges it is unreasonable to grant Pacific's requested rate increase.

The evidence showed that Sierra entered into the present contract to secure an adequate and reliable source of power for a long period of time. Sierra had the guarantee of the Federal Power Act that Pacific's rate for the service under that contract would be just and reasonable. Not satisfied with this, however, Sierra claims that it should also be guaranteed against any increase in rate. Pacific did not agree to serve Sierra on any such basis and the law does not grant Sierra any such immunity from increases in cost. If Pacific received an unreasonably high rate of return, Sierra would have been entitled to demand and obtain from this Commission a reduction in the rate. Conversely, if Pacific's rate of return becomes, as has been shown here, unreasonably low then Pacific is entitled to an increase in the rate. Neither company is

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entitled to take advantage of the other by reason of the fact that the present rate is incorporated in a service contract.

The remainder of this brief will outline the history of service to Sierra, show that Pacific did not agree or represent that its rate could not be increased and show that when all circumstances are considered the proposed increase is just and reasonable to both Sierra and Pacific.

A. Outline of Dealings Between Pacific and Sierra.

The service areas of Sierra and Pacific are separated by the Sierra-Nevada Mountains, for the most part rugged and uninhabited territory. The first connection between them was made in 1923 under a contract[5] which required Pacific to extend a 60,000 volt transmission line eastward and Sierra to extend westward to a connection at the summit of the mountain range. Service under this contract was to be rendered at the rate of Pacific's Schedule P-6, a tariff filed with the California Commission generally applicable to resale service. The contract was for ten years with an option, which was exercised, for an additional five years.

Approximately at the end of the fifteen years, in 1938, the companies made a new fifteen year agreement[6] which provided for construction of a second 60,000 volt transmission line for service to Sierra at the same point of delivery at Summit. The new contract contained a special rate[7] which had a higher demand charge and a lower energy charge

than Schedule P-6. In addition a standby charge of $30,000 per year was required, in recognition of the fact that Pacific was, in effect, standing by for 4,000 kilowatts out of Sierra's 9,400 kilowatts of hydroelectric generating capacity.

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[5] Later designated Pacific's Schedule F.P.C. No. 1 (Ex. 5, Second contract).

[6] Later designated Pacific's Schedule F.P.C. No. 2 (Ex. 5, Third contract).

[7] Except for the period prior to July 1, 1939, during which Pacific's then effective Schedule P-6 was the basis of charges.

In 1946 Pacific and Sierra discussed the need for additional capacity to serve Sierra's expanding load requirements. An agreement was reached at the end of the year to replace the conductors on the two 60,000 volt transmission lines with larger ones for this purpose. No change was made in the service contract at this time.

It was recognized that further measures would have to be taken if Sierra's peak loads in 1949 and thereafter were to be met. Sierra had already looked into various alternatives for additional power. These included construction of a steam plant at Reno, establishing a connection with Boulder Dam, Federal development at Lake Tahoe, Federal power from a Boulder-Bonneville tie line and development of some small projects by the Bureau of Reclamation. However, in December 1946 Sierra urged Pacific to make a proposal for construction of a third transmission line. Pacific responded in January 1947 with an offer to construct such a line to be operated at 110,000 volts, on condition that a new fifteen year contract be entered into at the same special rate then in effect under the 1938 contract with the addition of a fuel escalator clause. Considerable discussion followed as to whether the new line should be constructed for 60,000 volts or 110,000 volts. Pacific estimated that its cost of service would be some $63,000 a year less at the higher voltage and that this voltage also offered engineering advantages over the long run. Sierra on the other hand operated its main transmission system at 60,000 volts and would have

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needed a stepdown substation to take delivery at the higher voltage.

While these possibilities were being reviewed Sierra took under consideration a proposal to obtain power from the

Bureau of Reclamation's Shasta Power Plant. Consideration of this possibility had been dropped earlier because of the long transmission line required and the Bureau's policy of giving priority to municipalities and public agencies in the sale of its power. The new proposal contemplated that an agency of the Nevada State Government, the Colorado River Commission, would contract directly with the Bureau for 90,000 kilowatts and then allot some of this power for delivery directly to Sierra-Pacific. The proposal could not meet Sierra's requirements because the Bureau had no transmission line and no appropriation to build one. The Bureau's most optimistic hope was that Congress might make an appropriation and that a single circuit line could be completed by 1951. This clearly would have been too late and too little. It would have been too late to meet power loads in 1949 and 1950 and it would have been too little because Sierra could not depend for a large portion of its requirements on a single circuit line supplied by one hydroelectric source 200 miles distant. Nevertheless, Sierra was under considerable public pressure to obtain so-called "cheap" government power and early in October 1947 it asked Pacific if it could not make a concession in the offered rate. Pacific declined initially but three weeks later at a meeting in Reno offered Sierra its P-31 rate plus the same $30,000 per year standby charge which was then in effect. The P-31 rate was a filed tariff of Pacific instituted in 1945 and generally available to resale customers purchasing all

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of their requirements from Pacific under five year contracts. Operation of the new transmission line at 110,000 volts was agreed upon with Pacific paying carrying and operating charges on Sierra's stepdown substation up to $30,000 a year. Final details of the contract were worked out and it was signed on March 4, 1948.

At a hearing before the California Public Utilities Commission[8] on April 15, 1948, Sierra justified the new contract on three principal grounds:

(1) There was no other source of additional power available to Sierra by which it could meet its customer's requirements in 1949;

(2) No other source of power would have the reliability that could be obtained from Pacific. (Bureau power in particular required a standby source "to assure anywheres near reasonable service" (Ex. 12, p. 28)); and

(3) No other source of power would be as economical since to the lower Bureau rate a charge for standby service from some other source would have to be added and this would make the cost "prohibitive" (Ex. 12, p. 31).

The California Commission approved the contract saying: "Reference was made to the possibilities of securing power from other sources. However, the record clearly shows that none of these other sources could be developed or could be obtained before 1951 at the very earliest and further that development by that time was uncertain. Contrasted with this it was shown that the present resources of the Sierra Pacific Power Company would supply the load growth in its area until 1949, and that it was imperative that additional power be secured before the close of that year or

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Sierra would be unable to fulfill its public utility obligations." (Ex. 13, p. 4).

Subsequently the contract was filed with the Federal Power Commission and made effective retroactively to

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[8] Transcript of this hearing constitutes Ex. 12.

January 1, 1948 in accordance with its terms, under the designation Schedule F.P.C. No. 3.

Approximately a year later, in October 1949 Pacific applied to the California Public Utilities Commission for authority to increase its rates by 6%. Later, in the course of the hearing on that application Pacific requested that Sierra be added to the list of special contract customers to be exempt from the proposed increase. The six percent increase subject to the requested exemptions, was granted in April 1950. In July 1951, when this increase proved insufficient in the face of post-Korean inflation, Pacific requested a further increase of approximately 18½% in its electric rates. Sierra opposed the application of such an increase to it, appeared in the proceeding as a protestant, presented testimony in support of its views, and argued against any interim increase. In October 1952, the California Commission authorized substantially the rate increase requested by Pacific but stated that the rates for Sierra and other resale customers receiving service under special contracts would not be increased pending an opportunity for renegotiation of the contracts. Sierra has refused to negotiate with respect to an increase and Pacific has made a new application to the California Commission for authority to increase the rate to Sierra, so far as it lies within that Commission's jurisdiction.

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B. Pacific Did Not Agree to Any Limitation on Its Right to Obtain an Increase in Rates.

1. The Agreement of the Parties Is to Be Determined from the Service Contract Itself.

As the foregoing outline indicates, the present service contract was the fruit of a long period of discussion and negotiation involving consideration and balancing of a number of factors by each of the contracting parties. The resulting service contract was clearly intended to constitute a final expression of the terms of their agreement. It is familiar law that "If the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same matter are excluded from consideration whether they were oral or written." 3 Williston on Contracts, Rev. Ed. 1817 (Sec. 632). Although this principle is commonly given effect under the label of the parol evidence rule, it is recognized that it is a rule of substantive law "because it deals with the question where and in what sources and materials are to be found the terms of a jural act." 9 Wigmore on Evidence, 3d Ed. 77 (Sec. 2425).

Looking at the service contract by itself in accordance with this rule, it is impossible to find any promise, representation or commitment by Pacific with respect to the permanency of the rate. Both parties were public utilities familiar with laws regulating rates and are presumed to have contracted with full knowledge that the terms of their agreement may be changed by a regulatory commission acting in the exercise of its jurisdiction. No limitation or qualification with respect to the exercise of such jurisdiction was incorporated in the contract, and, of course, no attempt to do so could have been effective. The contract

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contained a standard provision required by the California Public Utility Commission stating that "this agreement shall at all times be subject to such changes and/or modifications as said Commission may from time to time direct in the exercise of its jurisdiction" (Ex. 1, last page). This provision merely stated what the law would hold in any event. Undoubtedly, the California Commission required its insertion in service contracts to place customers on notice of the Commission's authority. The Federal Power Commission, of course, has similar authority within its jurisdiction and no written provision to that effect is necessary.

It is self evident that the Federal Power Commission could not be bound by any matters outside of the schedule submitted to it. In making effective this service contract as Pacific's Schedule F.P.C. No. 3 the Commission had before it only the contract itself and information submitted in compliance with the Commission rules, such as estimated sales and revenues.[9] This Commission must have assumed then, as it should now, that this schedule was subject to change in the same manner as any other tariff subject to its jurisdiction.

2. The Prior Negotiations Between the Parties Confirm That the Rate Is Subject to Increase.

Much evidence was introduced in this proceeding relating to negotiations between the parties prior to execution of the service contract, including letters exchanged between the companies and also memoranda for intra-company purposes which were not seen by the other party to the trans-

action until the hearing in this case some five or six years later. Most of this evidence was received over the objection of Pacific on the ground that it was not material or relevant to any issue in the proceeding, since the agreement was embodied in the service contract and neither party would be bound by prior statements or commitments. However, in all this evidence there is not one word of agreement, representation or discussion to indicate that either Pacific or Sierra understood or intended that the service contract being negotiated would be different from any other public utility service contract subject to change by regulatory authority. If, as Sierra contends, such a significant departure from the usual rules of law applicable to a public utility service contract was intended it is indeed surprising that not one word on the subject was expressed by either party. It is also noteworthy that even in the oral discussions between the two companies, Mr. Tracy could not find one statement on this subject to mention in his testimony in this proceeding.

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[9] The record is silent as to the proceedings on authorization of Schedule F.P.C. No. 3 and it may be presumed, as is the fact, that nothing material to the present issue was then presented to the Commission.

3. The Testimony and Statements on Behalf of Sierra in Proceedings Before the California Commission to Secure Authorization of the Service Contract Confirm That the Present Rate Is Subject to Increase When the Return Therefrom Is Not Fair and Reasonable.

After the execution of the contract, the California Public Utility Commission held a hearing in San Francisco on April 15, 1948 to determine whether it should authorize the carrying out of the contract terms. Mr. Tracy, the president, and Mr. Devore, an engineer of Sierra, testified in that proceeding as they did in the present matter. In 1948, however, neither Mr. Tracy nor Mr. Devore nor their counsel indicated in any way that they regarded or intended that

this service contract should not be subject to change as is any other public utility service contract.

In the course of that proceeding Mr. Tracy was asked by his counsel, Mr. Dahlquist: "What is your view of the necessity for a 15-year contract, Mr. Tracy?" If Mr. Tracy had any idea that the rate was to be fixed for the term of the contract it would be expected that he would have so stated in answering this question. Instead, however, he answered:

> "When load conditions are such that you have to have additional capacity it might be that that additional capacity could be arranged to carry you over for a short period—be sufficient to carry you over for a short period, but in case where you have to go to a relatively large investment it is only fair and buisness —proper business that the Company you are negotiating with gets a proper return on the investment for that period. That is the basis upon which we would operate ourselves, we would not expect anybody to go to a large investment which is necessary in order to give the Company capacity they need for any shorter period than that." (Ex. 12, p. 26)

At that time Mr. Tracy evidently believed that the term of the contract was fixed for the purpose of affording Pacific an opportunity to obtain a *proper* return on its large investment to serve Sierra. He even expanded upon what he meant by "proper return" when he said that this was the basis upon which he would operate his own company. His standards for Sierra were shown in the following testimony given in the course of cross examination by Mr. DuVal, in January 1952, before the California Commission upon Pacific's request for a general rate increase:

> "Q. As an operator of a—as the President of the Sierra Pacific Power Company and as the head—as the

> Operating Head of that Company and having a rather long experience in the public utility business, would you agree with the statement that a public utility

should be entitled to charge rates which will accord it a fair and reasonable return on its investment?

A. I think that is a fact.

Q. And if it is necessary to increase existing rates to accord such a return would you think that that was a proper action for a utility to take?

A. That is the proper way to get a proper return, yes, sir." (Ex. 23, p. 1411)

C. The Use of the P-31 Rate as the Basis for the Present Charges to Sierra Did Not Obligate Pacific to Maintain That Rate for the Contract Term.

As has been stated before, the present rate is based upon a standard filed tariff of Pacific, known as Schedule P-31 (Ex. 20), of general application to resale customers in 1947 and 1948 when the Sierra service contract was negotiated and executed.

In the P-31 rate, adopted in 1945, Pacific offered what amounted to a 10% reduction from Pacific's then existing P-6 Schedule for resale service, provided that the customer would sign a five year contract. There is no question that this schedule was adopted to meet competition from the United States Bureau of Reclamation for the business of municipal resale customers. The Company believed that it was desirable to offer the lower rate rather than lose the business of these municipalities entirely.

It should be noted that although this rate was set up to meet a competitive situation it was made available to all resale customers without regard to their access to individual competitive power sources, in order, as the California Commission said, "to generally preserve the uniformity of [Pacific's] resale rate classification, even where competition is not as imminent as in the northern Sacra-

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mento Valley portion of Pacific's system, where Shasta generated power can most readily be supplied." (Ex. 9, p. 349). The agreement on the P-31 rate for Sierra therefore does not imply that Pacific regarded competition for Sierra's business as a factor in the situation.

It should also be noted that Sierra has had the benefit of the P-31 rate unchanged for more than the five year period of the service contract required by that tariff. This is the longest period which Sierra could claim should be governed by any special requirements of the P-31 schedule. Since Sierra's service contract runs for a minimum of fifteen years for reasons which, as Mr. Tracy testified, were not related to this particular schedule, whatever purpose the five year contract of the P-31 rate was intended to serve has no application to any period beyond the first five years of the Sierra service contract.

Although the foregoing would eliminate at the outset any need to explore the basic principles behind Schedule P-31 as a competitive rate, we cannot leave unchallenged the serious errors which have led to Sierra's contention that a competitive rate must remain unchanged.

1. In Placing the P-31 Rate in Effect Pacific Did Not Intend That Its Stockholders Should Suffer Any Reduction in Return.

When the P-31 tariff was originally filed with the California Commission it ordered an investigation to determine whether the rate reduction was "unjustified because of the possible burden it might place upon other customers."

(Ex. 9, p. 348). In the course of this proceeding Mr. B. B. Beckett, then Pacific's rate engineer, testified as to the theory involved in the offer of a competitive rate. He emphasized that a comparison must be made between the costs that could be saved if the customer were lost and the revenue that would be received if the business were retained by the grant of the lower rate. If the revenue is greater than the costs that would otherwise have been saved, it is to the advantage of the Company and its customers to grant the lower rate.

Mr. Beckett pointed out, however, that the immediate effect of the lower rate is simply a reduction in return to the utility. Yet the utility is entitled to a full return on all capital devoted to public service. On the next occasion for a review of its rates in general, the total revenue will be made to approximate that required for the full reasonable return. Although other customers then must take up the "slack" resulting from the competitive rate reduction nevertheless the "slack" is not as great as it would have been if the business were lost.

Putting the matter in another way, the utility does not intend to sacrifice the reasonable return to which it is entitled when it offers a competitive rate reduction. Temporarily, the utility will suffer some loss but subsequent rate adjustments will restore its return at less cost to its other customers than if it had lost the business.

All this is based on the premise that the competitive rate produces enough revenue to exceed the costs that otherwise would have been saved. If, through bad judgment, changes in cost, or for other reasons the revenue should not be sufficient for that purpose then there is no advantage in retain-

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ing the business and either the utility or its customers must stand a loss that might have been avoided. The California Commission took the view that the risk of any loss of this character resulting from the competitive rate must fall on the utility. The Commission said, in its opinion authorizing the P-31 tariff (Ex. 10, p. 349):

> "* * * the loss, if any, incurred by a utility offering a competitive reduced rate, must be borne by the utility itself and will not be permitted to burden its other customers."

It is evident from the foregoing, from the Commission's statement of the purpose of the proceeding, from Mr. Beckett's testimony, and from the general economics of the situation that the Commission was concerned with and speaking only of the problem of whether the utility itself or its other customers should bear the impact of any loss caused by failure of the competitive rate to cover the costs that otherwise would have been saved—the so-called out-of-pocket costs. Pacific has never understood or agreed that by the foregoing statement the California Commission intended that the P-31 rate should thereby be exempted from any increase. The Commission itself has confirmed that view. Twice it has increased the P-31 rate and authorized application of the increases to customers holding five year service contracts. The first was in 1950 when the six per cent general increase was granted. The second was in 1952 when the Commission directed that Schedule R, the basis of the rate proposed here, should replace Schedule P-31.

Taking the P-31 tariff by itself, then, its use in the Sierra service contract is no impediment to a rate increase to Sierra.

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2. Sierra Is Not Entitled to Have Pacific's Stockholders Underwrite Losses Arising from Service to Sierra.

We believe that the California Commission was clearly in error when it applied a different rule to the Sierra contract. After determining, in effect, that an increase to the Schedule R level would be reasonable for Sierra and charging Pacific with revenue from Sierra as though such an increase had been authorized, the Commission declined to make the increase effective immediately. Instead it authorized Pacific to obtain the increase by renegotiation. Pacific attempted such renegotiation with Sierra but met with flat rejection. The Commission endeavored to justify its refusal to order an increase to Sierra and other special contract resale customers on the ground that Pacific entered into the contracts "with the clear understanding that its stockholders must bear any burden which [Pacific] might sustain as a result of operation of any such contracts" (Ex. 17, p. 42). This evidenced a complete misunderstanding as to the purpose of a competitive rate reduction and it is not a conclusion which the Federal Power Commission should accept. Pacific has challenged this result by instituting a new proceeding before the California Commission to obtain a just and reasonable rate for service to Sierra, so far as it lies within the Commission's jurisdiction. (See Ex. 22, pp. 3 and 4)

It is not surprising, however, that Sierra has accepted the California Commission's reasoning on this point. It may fairly be said that Sierra's entire case rests on its assumption that Pacific's stockholders are required to bear any burden which results from agreeing to the P-31 rate for Sierra in 1948. Unfortunately for Sierra, this argument proves too much. This would mean that whatever increase

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in costs was experienced by Pacific, there would be no possibility of increasing the rate even to cover bare out-of-pocket expenses. Realizing the unreasonableness of this position, Mr. Tracy stated that it was his understanding that the rate could be increased if "the public interests are involved." By this he understood that as long as the situation did not involve rate payers the public interest was not involved (T. 954). Of course, if Pacific had agreed that its stockholders would bear the loss, the rate payers would never be involved unless, perhaps, the Company were on the verge of bankruptcy and its service might be impaired.

Some of the statements of counsel for Sierra would indicate that it is their view that the stockholder is expected to bear the burden only to the point where out-of-pocket or incremental costs are covered and that if revenues fall below that point, a rate increase might be warranted. The preceding analysis shows that exactly the opposite was intended. Where a competitive situation actually exists, the lower rate is offered for the benefit of the business as a whole and the stockholder does not expect any reduction in return over the long run. The other consumers are expected to benefit by comparison with the costs which would be imposed upon them if the business were lost. It is when the revenues fall below the out-of-pocket costs that the stockholder is required to bear the burden, presumably as a penalty for bad judgment on the part of management in retaining the business. The requirement that the stockholder bear the burden in such cases is not intended to have anything to do with the utility's obligation to continue the low rate. It is actually made as an incentive to the utility to drop the business entirely if it is not possible to raise

the rate and keep the business where it does not return out-of-pocket costs. It deals solely with the distribution of loss between the stockholders and the other customers. It should not be understood or applied as having anything to do with the relation between the utility and the customer receiving the low rate.

3. Pacific Would Not Be Justified in Accepting an Unreasonably Low Rate of Return to Obtain New Business from Sierra.

The purpose of offering the P-31 rate to municipalities was to avoid some of the expense incident to having idle facilities if the business were lost. No purpose is served by offering a rate which covers only out-of-pocket costs to obtain new business. The P-31 rate cannot be restricted to this function when it is offered to obtain new business. This distinction should not be lost sight of. The reasons for offering a competitively reduced rate to retain business do not apply to obtaining additional business, particularly where a substantial investment must be made to secure that business. If the additional business is not obtained there is no problem of being left with idle investment because the investment will not be made. The additional investment must justify itself by producing a reasonable return in the long run or else there is no point in taking on the additional business. This additional investment includes not only transmission lines but also the system production costs which will be incurred in order to have the increased capacity available for service. Although Pacific conceded in 1945 that P-31 as a class rate would not be fully compensatory, it does not follow that the rate was intended or expected to cover only out-of-pocket costs when offered to obtain new business, nor that Pacific should be obliged to retain it on any such basis.

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In making a new contract with Sierra in 1948 Pacific was endeavoring to fix the basis on which a large investment would be made to secure a substantial amount of additional business. It was not faced with the prospect of losing the existing business, which was being served under a contract which had five years more to run, because Sierra had no other available power source. The proper question is whether the proposed return of not more than 4.75% from Sierra is reasonable in view of the investment which Pacific was obligated to make and maintain for service to Sierra. At no time did Pacific represent to Sierra or to the California Commission that it did not expect to receive a reasonable return from this business.

In short, the P-31 rate was offered to Sierra as a standard tariff which could be adapted to the situation by the addition of a standby charge. It was offered to a customer which had no alternative source for the additional capacity which it badly needed and was incorporated in a contract which was made for the sole purpose of providing this additional capacity. The considerations applicable to a competitive situation had nothing to do with the rate determination.

D. Pacific Is Not Estopped from Increasing the Present Rate to Sierra.

Although counsel for Sierra did not use the term estoppel in the course of the hearing on this matter, we assume that his statements that Sierra changed its position in reliance on the offer of the present rate were intended to raise this point.

In the first place, it is obvious that Sierra's argument begs the entire question. It could not rely on the present rate as being fixed for the term of the contract unless it were estab-

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lished that the rate was to be perpetuated for that length of time. If Sierra did rely on the unwarranted assumption that such was the fact, this reliance would add nothing to Sierra's case.

In the second place, Pacific made no representations which would justify such reliance. In all of the evidence which was received concerning discussions and negotiations prior to the execution of the contract, Sierra was unable to produce one statement as to the continuance of the rate, nor any intimation that the subject was even discussed. It should be clear from the discussion of previous points that the contract which was executed was intended to be subject to change whenever this Commission finds such change to be just and reasonable.

In the third place, Sierra is not justified in taking the position that because the contract is subject to change that it receives no benefit from the agreement. The rate was established at the level of a standard tariff which was deemed approriate and reasonable for the conditions which then obtained. Pacific has and claims no arbitrary power to change this rate. Sierra has had at all times the protection of this Commission against any increase which is not just and reasonable and Sierra was and is just as capable as any other customer of a public utility to manage and plan its business on that basis.

In the fourth place, Sierra will be entitled to pass on to its customers any increase in its power costs which results from Pacific's proposed rate increase except to the extent that the increase should be absorbed by earnings in excess of a reasonable return. If the full increase in power costs is passed on to Sierra's consumers, it will require a rate

increase on Sierra's system of only 7.4%. Thus far, Sierra's electric customers have escaped entirely the effect of the inflation in utility costs which took place during the war and the post war period. In 1946, these customers even had the benefit of a rate reduction. In the light of the inflation which has increased costs during these years, the rate proposed by Pacific will not be unreasonable either to Sierra or its customers.

In the fifth place, it should be pointed out that when Sierra compared the various possibilities for obtaining additional power, it knew that there were uncertainties involved in its estimate of costs from each source. So far as can be determined now, it would seem that purchase from Pacific offered to Sierra in 1948 far more certainty as to costs (as well as to reliability of service) than any other source, even taking into account the fact that this rate, like all of Pacific's rates, was subject to change when authorized by this Commission. The principal alternatives which Sierra considered may be briefly reviewed to demonstrate the truth of this statement:

> 1. *Steam Plant Construction.* Mr. Tracy thought, in May of 1946 with fuel oil at $2.05 per barrel f.o.b. Reno, that he could generate power in a modern steam plant at a lower cost per kilowatt hour than the 1938 rate of Pacific to Sierra (T. 888, 985). He thought that the cost per kilowatt hour would have been "* * * in the neighborhood of perhaps seven to eight mills" (T. 889). This may be compared with the per kilowatt hour costs under the increased rate now proposed by Pacific which for 1952 would have been 7.4 mills and for 1953 are estimated at 7.2 mills.[11] This comparison, although not
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> unfavorable to the proposed rate, is not by any means

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[11] These figures are derived directly from the kilowatt hours and billings shown on page D of Ex. 4.

the whole story. The cost of fuel oil in Reno which, of course, would be a major item in the cost of steam generated power is dependent not only on the fluctuating price of oil but also on the costs of transportation by rail tank car over a very considerable distance. Mr. Tracy avoided giving any figures for the cost of fuel oil f.o.b. Reno subsequent to May 1946. This Commission undoubtedly knows that price ceilings were discarded after that time and that the cost of both fuel oil and rail transportation rose rapidly thereafter. Mr. Tracy's silence as to such costs in the latter part of 1947 and the early part of 1948 when he had to make his decision on purchase from Pacific is significant and we venture to state that his cost of fuel oil at that time would have exceeded $3.00 per barrel. In any event, the point is that fuel oil costs are far less stable than regulated utility rates. The capital cost of constructing a steam plant was likewise an uncertain quantity in 1947 and 1948. Sierra could not be certain that its estimates of construction costs would hold for even the length of time it would take to get a steam plant construction job underway and completed.

2. *Hydroelectric Sources.* The costs of constructing a hydroelectric plant were, if anything, more uncertain than steam plant construction costs. Sierra could not rely on its estimates of the cost of dams and other facilities with any degree of certainty in 1947 or 1948. As any price index will show, construction costs skyrocketed betwen 1946 and 1949, and after the start of the Korean action leaped again. While Sierra could not predict these increases it could be sure in 1947 that construction costs were far more liable to change than public utility rates.

3. *The Bureau of Reclamation.* The Bureau rate was not firm (Ex. 30, First page) but was subject to

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change by the Secretary of the Interior, who was given wide discretion to fix rates by Section 9(c) of the Reclamation Project Act of 1939 (53 Stat. 1187, 1194). Furthermore, Sierra's comparison of the costs of Bureau power with Pacific's present rate omitted any consideration of several major items which could have materially affected the real cost of accepting the Bureau proposal as an alternative. Sierra did not take into account the costs that would be involved in finding and obtaining additional power during the years 1949, 1950 and in all probability in 1951 before the Bureau power would become available. Sierra also omitted any consideration of the effect of the minimum charge which would be involved in assuring that the capacity it would require from the Bureau would not be allocated to some other Bureau customer. Sierra's comparison did not include the cost of standby power which it regarded as absolutely necessary for service from the Bureau, which cost it admitted would be "prohibitive" (Ex. 12, p. 31). Nor did Sierra take into account the uncertainties involved in possible loss of revenue due either to unreliability of Bureau service or loss of business resulting from the priority or preference which would be given public agencies in Nevada if Bureau power were made available to Sierra's system.[12] An added uncertainty was the failure to determine what investment would be required of Sierra in order to take power from the Bureau. Sierra did not even ascertain the voltage at which delivery would be made.

It does not appear that Sierra pursued any other possibility for obtaining power to the point where it made any determination of costs which could be used as a basis for comparison.

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[12] Under the proposed Bureau contract (Ex. 21, p. 17) Sierra could have been required to wheel power to such customers for the account of the Bureau or the Colorado River Commission.

Lastly on the subject of estoppel it should be pointed out that Sierra was not in the position of choosing between action and inaction. Most of the other possibilities would have involved a far greater commitment in capital expenditures than the cost of the transmission line which Sierra constructed to take delivery from Pacific of the additional power. Whether the Bureau proposal would have required the same or even greater expenditures is uncertain but it will be noted that the assumed point of delivery was at Summit, the identical point where Pacific agreed to make delivery. It was necessary for Sierra to make a major capital expenditure if it was to fulfill its obligation as a public utility to its customers and continue to supply adequate service. Sierra's management had to make an immediate decision on the basis of its best judgment with full realization that many uncertainties would be involved whatever choice was made. It would have been unwarranted in assuming that Pacific's rate would be fixed for the entire term of the contract and there is nothing unjust or unreasonable in requiring Sierra—and ultimately Sierra's consumers rather than Sierra—to take up a fair share of the burden of increased costs to Pacific of supplying the power. Sierra's conclusion that Pacific's offer was "the best and most dependable contract" which it could obtain (Ex. 12, p. 26) was entirely valid and justifiable if the possibility of a change in the course of regulation was taken into account as it must have been.

It is clear that Sierra can not argue that any change of position on its part was detrimental. Some change was necessary and that fact can not be made the basis of a claim that Pacific's rate must remain fixed.

E. The Purpose of the Service Contract Will Still Be Served if the Proposed Rate Increase Is Granted.

Analysis of the service contract shows that none of the purposes which it was intended to serve will be impaired by the proposed rate increase. Each of the basic terms of the contract was adopted for reasons which are just as valid in relation to the proposed rate as to the present rate.

The first provision of the contract is that Pacific shall supply Sierra with substantially all of its power requirements in excess of Sierra's own generation. Sierra could find no other available source in 1948 and has no available alternative at the present time. Sierra has made an investment in excess of one million dollars in transmission facilities in order to receive additional power from Pacific under the contract. In order to assure Sierra of this continued supply of power and protect its investment, Sierra must retain the obligation of Pacific to supply its requirements.

Inseparable from the foregoing provision is the obligation of Sierra to purchase substantially all of its requirements from Pacific over and above Sierra's own generation. Pacific has an investment in transmission facilities originally costing almost two million dollars which for the most part would be useless or uneconomic unless used to deliver substantial volumes of energy to Sierra.

This requirement makes the service contract parallel the clause of Schedule R (and likewise of Schedule P-31) which limits application of the schedule to resale customers who "take their entire electric energy supply from the Company." If Sierra were free to obtain power from other sources, Pacific could be required to furnish power at unfavorable load factors for which the rate was not designed.

Certainly, if Pacific is obligated to meet all of Sierra's requirements Sierra shoud have the mutual obligation to purchase those requirements from Pacific.

The fifteen year term of the service contract is directly related to the special investment in transmission facilities required to serve Sierra. By the express terms of the agreement the parties are assured of a minimum of fifteen years usefulness for these facilities. If an additional transmission line is constructed the contract is to be extended so that there will be a fifteen year period of usefulness for the additional line. The adoption of a fifteen year period was evidently based on the two previous service contracts between the companies, each of which provided for construction of a transmission line for service to Sierra and each of which had a term of fifteen years.

All of the evidence as to the term of the contract contradicts Sierra's present position that it is related to the presently effective rate. The fifteen year provision was contained in Pacific's original proposal of January 1947 long before Pacific agreed to the P-31 rate and obviously was accepted throughout the negotiations by both parties without any further discussion. On two occasions before the California Commission, Mr. Tracy was asked the reason for the fifteen year term. The first instance, in 1948, has been quoted previously and shows that protection of investment of the parties was the only reason for the fifteen year term. In 1952 Mr. Tracy had another opportunity to explain the reason for the fifteen year term. The question by Mr. DuVal and Mr. Tracy's answer were as follows:

> "Q. While the Commissioner has stated that the record in the contract proceedings contains the sup-

> port for the contract or purportedly it did, you made the statement that you made this 15 year contract because you wanted to have assurance of power supply and that it was the best source of power at reasonable rates. Is it not a fact, Mr. Tracy, that Pacific Gas and Electric Company was insisting on a 15 year contract in order to protect it in a very large investment that it had to make in facilities in order to bring power to the summit to supply to the Sierra Pacific Power Company?
>
> A. I think that works both ways. Yes, our company wished to have a firm contract too to cover our investment." (Ex. 23, pp. 1418, 1419)

There is no support for Sierra's argument that there is any relation between the term of the contract and the rate which would make unreasonable the increase herein requested.

Pacific was obligated by the service contract to construct initially one 110,000 volt transmission line 27 miles in length and in the event that Sierra's loads should later require it, a second similar line. Back of these lines Pacific had to provide generation and network transmission capacity on a continuous basis to supply the additional loads of Sierra. It is most unreasonable to interpret the contract as a commitment by Pacific to make such investments and provide continuous service over these lines over such a long period on the basis that the present rate must continue in effect regardless of whether it produces a reasonable return to Pacific.

VI

Sierra's Objection to the Procedure Under Which the Proposed Rate Increase Was Initiated Is Without Merit and Is Not Material.

In a Petition for Rejection of Pacific's filing, in a Supplemental and Amended Petition for Amendment of Order, in a Petition for Oral Argument and Postponement of Hearing, in a Petition for Re-hearing, and in a Motion for Oral Argument, Sierra has argued to this Commission that the procedure under Section 205(d) of the Federal Power Act could not be used to initiate an increase of the present rate to Sierra, on the ground that the rate was embodied in a special contract. Each of these motions and petitions of Sierra was denied or dismissed by the Commission except the final request for oral argument, which was unopposed. In denying Sierra's various applications, on sound authority, the Commission preserved to it the right to maintain its contentions as to the effect of the filing under Section 205(d) of the Act and as to the Commission's authority in this proceeding. Since this was interpreted by the Examiner to authorize Sierra to introduce evidence as to each of its contentions and since all of the material issues are now before the Commission for decision, it is clear that Sierra could not possibly have been prejudiced by the procedure that was followed. The matter is now before the Commission under statutory provisions which give it full authority to fix the reasonable and just rate for Pacific's service to Sierra. It seems unnecessary therefore to review in this brief Sierra's technical point as to prior procedure which can have nothing to do with the merits of the case.

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Conclusion

The post war increase in demands on Sierra's system for power made its existing arrangements for purchase from Pacific inadequate to supply its requirements. By 1947 it was obvious that prompt action was necessary to meet the situation. After investigation Sierra concluded that there was no practical or economically feasible alternative to Pacific as a source of power and entered into a new contract with Pacific providing for immediate construction of a new transmission line and contemplating ultimately the construction of a second additional line. Sierra thus assured itself of an adequate and dependable source of power supply. The new contract rate was substantially below that previously charged by Pacific, but equivalent to one of Pacific's filed tariffs for resale service. This contract on its face and in the light of all the circumstances attending its execution was subject to change by authority of this Commission whenever its terms became unreasonable.

Subsequent increases in costs experienced by Pacific, as well as every other business enterprise in the same period, have reduced the return to Pacific on capital allocated to Sierra to not more than 2.6%. Pacific's request for an increase, to the level of its new standard resale tariff, to bring its return up to not more than 4.75% will still leave the rate to Sierra far below that which the stipulated reasonable return of 5.5% would justify. Sierra's contention that Pacific is not entitled to this increase in its rate of return because of an alleged competitive situation in 1948 is contrary to the evidence and unsupportable in law. Sierra's related contention that Pacific agreed that its

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stockholders would bear the burden of these increased costs is likewise contrary to the evidence and unsupportable in law.

It is respectfully submitted that Pacific has shown that the present rate is unjust, unreasonable and unduly preferential and that the proposed rate is just, reasonable and not unduly discriminatory. The requested increase should be authorized.

Robert H. Gerdes
Ralph W. DuVal
Frederick T. Searls

Attorneys for Pacific Gas and Electric Company

Wheat, May & Shannon
Robert E. May
Of Counsel

* * * * * * *

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UNITED STATES OF AMERICA

Before the

FEDERAL POWER COMMISSION

In the Matter of
PACIFIC GAS AND ELECTRIC COMPANY

Docket
No. E-6482

Brief on Behalf of Sierra Pacific Power Company

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[Title Commission and Cause Omitted]

BRIEF ON BEHALF OF SIERRA PACIFIC POWER COMPANY

Statement of the Case

Pacific Gas and Electric Company (herein called "Pacific") is the proponent in the above-entitled proceeding of a proposed Supplement No. 1 to its Rate Schedule FPC No. 3 for service to Sierra Pacific Power Company (herein called "Sierra"). The proposed Supplement No. 1 provides for increases in the rates and charges fixed by Pacific's Rate Schedule FPC No. 3 for the sale of electric energy by Pacific to Sierra for resale to Sierra's customers. Sierra is an intervenor in the said proceeding in opposition to the proposed Supplement No. 1 pursuant to an Order of the Federal Power Commission issued April 17, 1953.

Pacific is a corporation organized and existing under the laws of the State of California and a public utility under the laws of that State. It is the principal source of the electric energy which Sierra distributes to its customers and Sierra's purchases amount to approximately 1½% of Pacific's total electric production. Substantially all of the remaining 98½% of Pacific's electric business is intrastate.

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Sierra, a corporation organized and existing under the laws of the State of Maine, is a public utility under the laws of the States of Nevada and California and is qualified to do business in those States. It is engaged in the business of generating, transmitting and distributing electricity, water and gas. In the year 1952 approximately 84% of the customers to whom Sierra supplied electricity were located in northwestern and central Nevada and approximately 16% were located in eastern California.

In 1952 about 77% of the kilowatt hours of electricity required to serve Sierra's customers were purchased from Pacific. The remaining 23% was largely generated in five hydro-electric plants having a capacity of approximately 10,000 kilowatts owned by Sierra and located on the Truckee River. For the year ending December 31, 1952 Sierra purchased an aggregate of 211,347,108 kilowatt hours of electricity from Pacific.

Proceedings to Date

Pacific commenced this proceeding on or about February 2, 1953 by filing with this Commission its proposed Supplement No. 1 to its Rate Schedule FPC No. 3 for service to Sierra. Rate Schedule FPC No. 3 is a special contract between Pacific and Sierra under which, *inter alia,* Pacific agrees to sell all the electric power Sierra may require for a period of fifteen years at rates specified therein.

This Commission by its Order issued March 13, 1953 suspended the effective date of said proposed Supplement No. 1 and directed that a hearing be held as to "the lawfulness of the rates or charges provided for in Pacific's proposed Supplement No. 1 to its Rate Schedule FPC No. 3" (Rec. p. 8).

On March 13, 1953 Sierra filed with the Commission its

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Petition, Protest and Complaint wherein it requested // that the Commission reject the proposed filing of Supplement No. 1 by Pacific on the grounds that it was improperly filed under Section 205 of the Federal Power Act. Thereafter on March 23, 1953, Sierra, in response to the Commission's Order issued March 13, 1953, filed its Supplemental and

Amended Petition herein requesting that the Commission modify and amend the said Order so as to reject the filing by Pacific of proposed Supplement No. 1 for the reason that the said contract could not be changed by a mere filing of increased rates under Section 205, but could only be changed after a proceeding under Section 206 (a) and a determination that the said contract is unreasonable. Sierra also requested, in the event such relief was denied, that the Commission modify and amend its Order issued March 13, 1953 to direct that a hearing be held solely as to the lawfulness of the filing by Pacific of its proposed Supplement No. 1 under Section 205 of the Federal Power Act. In addition to the foregoing, Sierra, on March 23, 1953, also filed with the Commission its Petition to Intervene as an interested party in the above-entitled proceeding.

This Commission on April 17, 1953 issued an Order granting Sierra leave to intervene but denying Sierra's requests that the filing of the proposed Supplement No. 1 be rejected and that the hearing directed by the Order of March 13, 1953 be a hearing solely as to the lawfulness of such filing. The Commission's Order of April 17, 1953 states, in part, as follows:

> "Sierra's petitions in all other respects be and the same hereby are denied, without prejudice to the right of Sierra to maintain its contentions as to the effect of the filing of Supplement No. 1 under Section 205 (d) of the Act, and as to the Commission's authority in this proceeding."

Thereafter, pursuant to the Commission's Orders issued

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March 13, 1953 and April 17, 1953, a hearing // was commenced on April 21, 1953 in Washington, D. C., before the

Honorable Marvin Farrington, Presiding Examiner, and such hearing was completed on May 1, 1953. At the close of such hearing a motion was made to dispense with the intermediate decision procedure and or or about May 18, 1953 Sierra field its motion for opportunity to present oral argument as to the matters before the Commission for decision as a result of the hearing and motion to dispense with the intermediate decision procedure. Pursuant to Orders issued June 17, 1953 this Commission granted the motions to dispense with the intermediate decision and for oral argument, and fixed dates for submission of briefs and for such oral argument.

The Issues Presented

The basic issues in this proceeding are very simple. First, as a matter of policy, should the Federal Power Commission permit its procedures to be utilized by a public utility for purposes described by the utility's own counsel as "double dealing repudiation" of a contract entered into with the express authorization of the State Utilities Commission and duly filed with this Commission, in the absence of any proof that the public interest requires such action? Secondly, as a matter of law, on the present record, has the Federal Power Commission power to abrogate or modify such a contract in the absence of such proof? In brief outline, the facts from which these issues arise are as follows:

Sierra has purchased electric power from Pacific under long term contracts since 1923. In 1946, Sierra's engineers estimated that the existing transmission lines theretofore constructed by Pacific would soon prove inadequate to furnish the power which Sierra would require to meet its rapidly growing demands. Sierra also desired to obtain power at lower rates than those // provided for in its then existing contract with Pacific. Accordingly, Sierra entered into extended negotiations, not only with Pacific, but with other potential sources of electric power, including the United States Bureau of Reclamation and the Colorado River Commission of Nevada, which offered to supply Sierra's needs at substantially lower rates than those charged by Pacific. Towards the end of 1947 Pacific finally agreed to reduce its rates and offered Sierra a fifteen year contract at a special filed rate which had been expressly authorized by the California Public Utilities Commission for long term contracts designed to meet competition and hold existing business.

Sierra accepted this offer, and on March 4, 1948 a new fifteen year contract at this low rate was entered into, binding Sierra to obtain all of its power, except such as was produced by its then existing facilities or supplied under minor standby and exchange agreements, from Pacific. In addition to provisions for the construction of additional transmission lines, the contract contained the condition precedent that before it should become effective the parties must be authorized by the California Commission to carry out its terms.* After a hearing, the parties were so authorized, subject to the condition that a loss to Pacific, if any, from the low rate, which was concededly not fully compensatory, should be borne by Pacific's stockholders, and not by its other customers. Thereafter the new contract was filed with this Commission as Pacific's FPC No. 3.

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*At that time Sierra was Pacific's sole interstate resale customer. and substantially all of the approximately 98½% of Pacific's remaining electric business was with customers who were within the exclusive jurisdiction of the California Commission.

The contract is now in force and by its terms still has ten years or more to run.

By 1952 Pacific had obtained all the benefits to which it was entitled under the contract, including the construction by Sierra of a connecting line and transformer bank

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at a cost to Sierra of nearly a million dollars, and all serious danger of competition for Sierra's business seemed to have been removed. Accordingly, in that year Pacific sought to repudiate the rate provision, while retaining the advantages of the remainder of the agreement, by applying to the California Public Utilities Commission for authorization to increase the contract's rates. That Commission refused the requested increase, whereupon Pacific filed its present Supplement No. 1 seeking the increase from this Commission. In these applications and the hearings resulting therefrom Pacific has not alleged that the contract rate has become so burdensome as to injure the public interest. On the contrary, Pacific's sole contention is that the proposed new rate is "reasonable" within the meaning of this Commission's rules governing rates for electric power, and that it is therefore entitled to charge such higher rate.

While we believe the foregoing facts are established beyond the slightest question of doubt by the record in this proceeding, largely by the sworn prior testimony of Pacific's own officials, nevertheless, in support of its present application, Pacific has undertaken to deny that the contract was entered into to meet competition or that it is subject to the condition that any loss from the low rate will be borne by its stockholders. It therefore becomes necessary, before turning to a consideration of the ultimate issues involved, to devote some time to a discussion of the evidence. We are quite confident that when the record is examined, no doubt whatever as to the correctness of the foregoing statement of basic facts will remain.

Pacific will no doubt seek to rely on certain cases holding that private rates are automatically superseded by filed rate schedules promulgated by Public Service and Power Commissions. As we shall show, those decisions are based

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upon statutes which expressly provide, // or have been interpreted by the highest State courts as providing, that only filed rates are legal.

Sierra does not challenge those cases, but contends that they are wholly inapplicable to the present situation. The Federal Power Act nowhere provides that existing contract rates shall be automatically superseded by approved Commission rates. On the contrary, the Act expressly recognizes the validity of existing rate contracts and contains express provisions as to how and under what circumstances such contracts may be abrogated or modified. Moreover, the present contract has been expressly authorized by the California Commission, and filed with the Federal Power Commission, so that the present rates are clearly legal rates.

It is Sierra's contention that a contract entered into under the circumstances here present is valid and binding, and can only be abrogated under the Federal Power Act if it be shown that the circumstances under which it was entered into and approved by the Commissions have so changed that the contract has become a burden which injuriously affects the public interest. No such circumstances are even alleged to be present here. Indeed, Pacific's own exhibits conclusively show the contrary.

If a party to a contract to furnish power at less than compensatory rates, entered into under such circumstances as are present here, can avoid its obligation by merely filing proposed new and higher rates and showing that the new rates are "reasonable", then such a contract is entirely nugatory and worthless, for it carries within its four corners the very provision which enables the seller to repudiate it at will. Unless it be held that such a contract is of itself against public policy—and we know of no reason why it should be—or that it is forbidden by the terms of

the Federal Power Act—and we think the language of Section 206 clearly shows that it is not—we do not see how, either as a matter of policy or of law, this Commission can permit such "double dealing repudiation" as is here proposed by Pacific.

Abstract of the Evidence

The Past Dealings Between Sierra and Pacific

Sierra has purchased a portion of its electric supply from Pacific continuously since 1923. During this period there have been three successive long term contracts entered into between the parties. The first contract under which power was delivered was a special contract dated March 23, 1923 entered into for a period of ten years with a right of renewal for an additional period of five years (Ex. 5, 2nd contract).* The right of renewal was exercised, so that this first contract covered the fifteen-year period from 1923 to 1938 (Rec. pp. 193-4). Pursuant to the terms of that contract Pacific erected a 60 kv line from its easternmost power plant located at Spaulding, California, to a metering station near the Summit Hotel on Donner Pass, at which point the power was delivered to Sierra (Rec. pp. 67-8; Exh. 2, p. 3).

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*No power was ever delivered under an earlier contract dated November 18, 1922 (Exh. 5. 1st contract).

Under date of June 6, 1938, a second special contract was entered into for a further period of fifteen years (Exh. 5, 3rd contract). This contract provided that Pacific furnish all the electric power which Sierra might desire, at a special rate approximating Pacific's then filed Schedule P-6, except for certain minor modifications (Rec. pp. 248-9; Exh. 12, p. 6). The contract also required Sierra to pay $30,000 a year to Pacific for standby for its own hydro-electric generating plants, and to pay in addition a minimum of $75,000

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a year to Pacific // in any year during the life of the contract in which Sierra purchased power from any source other than Pacific, except for certain minor standby and exchange agreements then in existence. Under this contract Pacific was also obligated to erect a second 60 kv line from its Spaulding-Drum development sources to the point of delivery to Sierra at the metering station at Summit. Both of these contracts were approved by the Railroad Commission of the State of California and both are on file with the Federal Power Commission as Pacific's Rate Schedules FPC Nos. 1 and 2, respectively (Rec. pp. 192-3, 195-6).

The third contract between Pacific and Sierra is the subject of the present proceeding, and was entered into on March 4, 1948, to run for a period of fifteen years (Exh. 5, 4th contract). This contract was entered into under the circumstances hereinafter set forth.

The Negotiations Leading Up to the Present Contract

As early as 1945 it became apparent to the management of Sierra that its rapidly increasing load would require additional sources of power over and above those provided by the two 60 kv lines erected by Pacific under the first two contracts (Rec. pp. 624, 677-8). Indeed, it became apparent that these facilities would probably prove inadequate several years before the expiration of the 1938 contract on November 1, 1953 (Rec. pp. 635-7).

Under the Federal law establishing the Boulder Dam project, 45 Stat. 1057 (1928), 43 U.S.C. § 617 *et seq.,* the State of Nevada was entitled to 18% of the electric power produced at Boulder (Exh. 11, p. 5; Rec. p. 679). Naturally, there was considerable agitation among citizens of Nevada who wanted Sierra to utilize this cheap power (Rec. pp.

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648-9, 690). The difficulty was that // Boulder is some 350 miles from the industrialized and developed portions of the State of Nevada centering around the City of Reno, which is in the area served by Sierra. The route is mostly over undeveloped desert and the expense of constructing a transmission line through such territory was prohibitive. However, during 1946 Sierra and California Electric Power Company, a utility operating in California in an area close to that served by Sierra, considered together the possibility of exchanging power. Sierra's suggestion was that it should supply California Electric with a part of Nevada's allotment of Boulder power at a point nearer the Boulder source of supply in the south, and in exchange California Electric would furnish power from its own production resources near Mono Lake, California, directly to Sierra (Rec. pp. 678-80; 734-6; 738-44).

In the meantime, Sierra had called Pacific's attention to its problems, and Mr. James F. Pollard, Manager of the Commercial Department of Pacific, made a field investigation in Nevada on May 5, 6 and 7, 1946. A complete and comprehensive picture of the situation then existing and as seen through the eyes of Pacific's own representative is set for in the report dated May 13, 1946, which Mr. Pollard prepared for Mr. R. E. Fisher, a Vice President of Pacific. This report is contained in pages 2 to 7, inclusive, of Exhibit 11.

After referring to Sierra's inceasing load and Sierra's estimates that by 1948 its peak demand might exceed its existing sources of power, Mr. Pollard pointed out that there were five possible sources in addition to Pacific from which Sierra might obtain additional power. At pages 4, 5 and 6 of Exhibit 11, he discussed these five possible sources in some detail.

1. *Build Their Own Steam Plant at Reno.* Mr. Pollard

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refers to Sierra's statements that: "* * * with mod- // ern high efficiency steam plant design they believe they could make all their own power at a lower cost per Kw. Hr. than they are paying PG&E if they could be relieved of their present contract with us which has until 1954 yet to run although they have not made any thorough study of steam plant possibilities recently" (Exh. 11, pp. 4-5).

2. *Connect with Boulder Dam Transmission Line at Eureka, Nevada.* This proposal was for Sierra to build a line to tie in at Eureka, Nevada, with a proposed line running north from Boulder Dam, but because of the great distances involved and the undeveloped nature of the route,

Mr. Pollard concluded that "This is not a very promising source of power for Sierra Pacific" (Exh. 11, p. 5).

3. *Federal Plants Proposed by Army Engineers Coincident with Lake Tahoe Flood Control.* Mr. Pollard discussed studies which were then under way by Army engineers and gave it as his opinion that "* * * it is not likely that any power will actually be available from that source for several years" (Exh. 11, p. 5).

4. *Tie Line from Boulder to Bonneville-Grand Coulee.* Mr. Pollard also discussed what he described as "* * * the grand scheme of the Federal Power development enthusiasts lead by the Bureau of Reclamation" to construct a power line from Boulder through the thinly populated and meagerly developed areas of Nevada to connect with the great power developments of Bonneville and Grand Coulee in the Northwest (Exh. 11, p. 5). Mr. Pollard did not consider this program economically sound, but he commented that: "* * * economy is too frequently a matter of small moment to the Bureaucratic planners and with the State clamoring for the realization of anticipated benefits from its share of Boulder power, if Sierra Pacific's supply is in

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jeopardy // of insufficiency from other sources, it might be a potent argument in Congress to secure funds for carrying out the Bureau's scheme" (Exh. 11, p. 5).

5. *Federal Development of Irrigation and Power Projects in Nevada.* In his memorandum Mr. Pollard referred also to extensive studies being undertaken by the Bureau of Reclamation for the development of irrigation reservoirs and power plants throughout the State of Nevada. While here again he doubted that these were economically sound, he suggested that "* * * with a free spending Congress it

is conceivable that some of [sic] all of them might be approved and subsidized by Congress. The Bureau talks about 5 mill government power and compares this with the average of between 8 mills and 9 mills which is the price paid to us by Sierra Pacific and on this basis it makes a very plausible story in its reports. This is one of the arguments that Sierra Pacific urges on us for a lower rate to them so as to minimize this advantage claimed by the Bureau in support of its otherwise fantastic schemes" (Exh. 11, p. 6).

Mr. Pollard then concluded that: "It boils down to a question of a steam standby plant of their own at Reno or another supply line from PG&E * * *" (Exh. 11, p. 6).

Mr. Pollard then went into some detail in considering the question of rates. He pointed out that Messrs. Tracy and Armstrong, President and Executive Engineer, respectively, of Sierra "* * * feel very strongly that they ought to have some relief from the comparatively high rate that they are paying PG&E under their present contract made in 1939 and which still has 8 more years to run" (Exh. 11, p. 6). He pointed out that Sierra's officials were embarrassed by criticism that they were stifling the growth of Nevada by the high industrial rates which they were com-

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pelled to // charge (Rec. p. 627), that their general service rates were higher than rates charged in adjacent areas in California by Pacific (Rec. p. 906), and that there was constant agitation over the alleged great advantages of cheap power said to be obtainable through the Bureau of Reclamation (Exh. 11, pp. 6-7).

Mr. Pollard then recommended that Pacific's Rate Department review the entire seven year record under the 1938 contract to see how profitable or unprofitable Sierra's business had been, and he concluded: "Such a study should be useful in arriving at a fair rate to be quoted for any additional service which we may ultimately decide to offer them and which will have a bearing on their determination as to whether to build their own steam plant or buy from us" (Exh. 11, p. 7).

He adds that he assumes both Pacific and Sierra will desire to cooperate in solving the problem in such a way as to avoid competition from government power projects (Exh. 11, p. 7).

As discussion of Sierra's problem in 1946 develops, it divides itself into two parts: how to meet the immediate shortage which it anticipated during the 1947-1948 peak, and how to meet the much greater demand which was expected during later years (Rec. pp. 628; 636-7).

During the summer of 1946 there appear to have been frequent discussions between representatives of Sierra and Pacific as to how best to solve these two problems. On October 3, 1946, Mr. Tracy, President of Sierra, wrote Mr. Fisher, a Vice President of Pacific, that Sierra believed the immediate situation could best be solved by recoppering existing lines, and suggested that as to the long range problem he would like to receive a proposal from Pacific for a new 66 kv line from Drum to the point of delivery at Summit capable of delivering approximately 20,000 kws (Exh. 11, p. 11).

There followed further correspondence and discussion,

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culminating by the end of 1946 in an agreement to // proceed forthwith with the recoppering (Exh. 11, p. 18).* In a letter to Mr. Fisher dated December 27, 1946 Mr. Tracy, after confirming the details regarding recoppering, which he assumed was to be undertaken under the existing contract, continued:

> "You state in your letter that the matter of further increases in delivery capacity over and above that provided for after the recoppering of the two present circuits, will be made the subject of further negotiations between us, as the matter is not immediately pressing. I believe that due to circumstances with which you are familiar, we should not delay our negotiations relative to a third line. We hope, therefore, that you will find it possible to proceed with the submission of a proposal in this connection in the very near future" (Exh. 11, p. 19).

On January 22, 1947, Mr. Fisher replied to this letter, agreeing that the recoppering would go forward without modification of the terms and conditions of the existing contract, and would be completed in time to take care of the 1947-1948 peak. As to the long term problem, he proposed that for the future Pacific construct a third circuit to be operated at 110 kv from Drum to Summit, and that Sierra construct a 110 kv line from Summit to a point to be selected by it, where it would install a stepdown transformer bank to reduce the power from 110 kv to 60 kv. Mr. Fisher stated that Pacific's engineers believed this method would be more economical than would the construction by Pacific of a 60 kv line originating at Drum Power house, as proposed by Mr. Tracy (Exh. 11, pp. 20-1). The reason for

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*See also page 1 of Exhibit 27, being the minutes of Pacific's Advisory Committee meetings of December 9, 1946 and January 6, 1947, added to the record herein by Commission Staff Counsel.

Sierra's insistence on a 60 kv line was that Sierra's distribution system could not take 110 kv power (Rec. p. 629).

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In this letter Mr. Fisher added: "As a condition of our making this additional installation, we would want a new long-term contract for, say, 15 years beyond January 1, 1949 [the date by which the new 110 kv line was to be completed] at substantially the same rates as those described in our present contract, except for the inclusion of an escalator fuel oil clause to take care of any future increases in the price of oil" (Exh. 11, p. 21).

Thus Mr. Pollard's recommendation of May, 1946, that a study be made by Pacific's rate engineers in an effort to meet Sierra's demands for a reduction in rates, had not borne fruit, and Mr. Tracy's sole reply to Mr. Fisher was to repeat his request for a proposal based on a third 60 kv line in lieu of the 110 kv line. He made no comment at this time with respect to the rates proposed by Mr. Fisher (Exh. 11, p. 22).

On April 1, 1947, Mr. Fisher sent Mr. Tracy the results of a study on the basis of a 60 kv line and stated that the installation of such a line would involve a further increase of $63,000 per year over and above the rates quoted in his January 22nd proposal (Exh. 11, pp. 23-4).

Except for some further correspondence regarding the reason for the high cost of the 60 kv line, Sierra remained silent as to the proposals contained in Mr. Fisher's letter of January 22, 1947, despite urgent requests for a reply from Mr. Fisher on May 7th (Exh. 11, p. 28), and from Mr. Pollard on July 28th, August 6th and September 3rd (Exh. 11, pp. 29, 31, 32). In the latter letter of September 3, 1947 Mr. Pollard wrote: "Having heard nothing further from you since I wrote you last on August 6, I am wondering what may have transpired in the meantime affecting this problem, and I would be delighted to have a line from you to keep us advised" (Exh. 11, p. 32).*

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Sierra's Negotiations with the Bureau of Reclamation

What had "transpired in the meantime affecting this problem", and had caused Sierra's silence on the subject of Pacific's offer of a fifteen year contract at existing rates with the addition of a fuel escalator clause, is quite apparent from the record: Sierra was considering various possibilities for obtaining power at lower rates from the United States Bureau of Reclamation.†

As we have seen above, an early proposal was for an exchange of a part of Nevada's 18% share of Boulder power with California Electric Power Company, a utility operating in California south of the area served by Pacific, but this plan gave way to the possibilities of better sources of power (Rec. p. 682).

Another proposal was what Mr. Pollard in his May 13, 1946 memorandum to Mr. Fisher had described as "the grand scheme of the Federal Power development enthusiasts lead by the Bureau of Reclamation" (Exh. 11, p. 5). This contemplated a "high tension tie line between Boulder and the great government plants in the northwest, Bonneville and Grand Coulee" (Exh. 11, p. 5). Even though, as Mr. Pollard pointed out, this plan might have been economically unsound, there was nevertheless much public support for such a scheme (Exh. 11, p. 5).

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*Pacific's concern over Sierra's continued silence regarding the January 22nd proposal is demonstrated by the minutes of the meetings of Pacific's Advisory Committee in June, July, August and September of 1947 (Exh. 27, pp. 2-4).

†On June 16, 1947 Pacific's Advisory Committee was told that "Mr. Tracy * * * stated he could not proceed with discussion of augmenting [Pacific's] delivery capacity to Sierra Pacific until the Central Valley situation is clarified" (Exh. 27, p. 2) and on August 4, 1947 that "Mr. Tracy will not act until negotiations of the Nevada Colorado River Commission involving Hoover Dam power or Central Valley power are further advanced" (Exh. 27, p. 3).

On December 12, 1946, Mr. J. P. Elmore of the Power Marketing and Sales Division of the Bureau of Reclamation held a conference at Reno with Mr. Tracy and other top personnel in the management of Sierra (Rec. p. 633). A

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memorandum of the subject matter of this // conference, at which various sources from which the Bureau might supply Sierra were discussed, is contained at pages 2 and 3 of Exhibit 21. At that time the Bureau also furnished Sierra with a copy of its "Interim Schedule of Rates for Firm Power Service" (Exh. 21, pp. 4-7; Rec. pp. 639-40).

On January 23, 1947, the day after Mr. Fisher's proposal for a new fifteen year contract at existing rates, Mr. R. S. Calland, Acting Regional Director of the Bureau of Reclamation, wrote Mr. Tracy informing him of the designation of his office as negotiating agent "with respect to sales of electricity by the Bureau to your Company" and outlining further the suggestions that had been developed by the Bureau engineers for the purpose of supplying Sierra's needs (Exh. 21, pp. 8-9). He pointed out that the most practical solution seemed to be to construct lines connecting Sierra with Shasta power through the Shasta-Sacramento line (Exh. 21, p. 8). It is quite apparent from these memoranda that if any satisfactory arrangement for obtaining the necessary power from the Bureau could be worked out, the rates would be very much lower than those proposed by Pacific.

One of the difficulties with the proposals of the Bureau was that they all contemplated direct sales by the Bureau to Sierra, a privately owned utility (Rec. pp. 680-2). Under existing statutes, priorities were set up pursuant to which such a utility's priority would rank low (Rec. pp. 640-1). The result of this would be that in the event of a power shortage, as, for example, in a year of drought, power sold to a utility would be cut off long before power sold to a government agency.

One early solution to this problem was a proposal which called for exchanging a part of Nevada's share of Boulder power for Shasta power and for the purchase of the Shasta

power from the Bureau for delivery to // Sierra through Pacific and the Colorado River Commission of Nevada, a State agency which would have a high priority. This early plan is described in some detail in an inter-office letter which Mr. George E. Devore, Water Resources Engineer of Sierra, sent to Mr. Tracy on January 17, 1947 (Exh. 26; Rec. pp. 1036-7).

Moreover, the citizens of Nevada, led by their public officials, Chambers of Commerce, etc., were not ready to give up hope of obtaining what was widely advertised as "cheap government power" from the Bureau (Rec. pp. 648-9). As a result of this agitation a further plan emerged for the Bureau of contract with the Colorado River Commission for the sale of Shasta power. The Colorado River Commission would then sell the power to Sierra at cost plus administrative expenses of the Commission (Rec. pp. 641-2, 682-7, 1018-19).*

Thereafter Mr. Devore had repeated discussions and negotiations both with Mr. A. M. Smith, the State Engineer of the State of Nevada and a member and Secretary of the Colorado River Commission, as well as with Mr. Elmore and other representatives of the Bureau (Rec. pp. 647, 683-5, 690). The plan was considered of such importance by the State of Nevada that the Legislature of that State amended the statute creating the Colorado River Commission so as to enable it to enter into such an agreement (Exh. 21, p. 10; Rec. pp. 641-3).

Mr. Tracy and the other officers of Sierra were of course kept constantly informed as to the progress of these discussions and negotiations (Rec. pp. 643-4). By the 21st of

October, 1947 they had reached a point // where a draft form of contract for the sale of power by the Reclamation Bureau to the Colorado River Commission in order to carry out this scheme was submitted to the Colorado River Commission (Exh. 21, pp. 11-26). Under the Nevada statutes establishing the Colorado River Commission, that Commission could not enter into any contract for the purchase of power from the Bureau until it had in turn entered into a firm contract for the re-sale of such power to Nevada purchasers. Accordingly the Nevada officials were pressing Sierra to enter into such a contract so that they in turn could go forward with the Bureau's proposed contract and obtain the benefits of cheap government power (Rec. pp. 646, 648-9; 684-5).

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*The seriousness of the efforts to bring government power to Nevada are reflected by the minutes of the meetings of Pacific's Advisory Committee, which show Sierra's refusal to negotiate with Pacific (Exh. 27, pp. 2-4). These minutes show that the Colorado River Commission also proposed that Pacific, Southern California Edison and the Bureau make a united effort to bring Boulder Dam power to northern Nevada (Exh. 27, p. 2) and, during the Summer of 1947, the Commission made applications for blocks of Bureau of Reclamation power for use in northwestern Nevada (Exh. 27, pp. 2-3).

Thus, in October, 1947, Sierra had two proposals before it: Pacific's offer of a fifteen-year contract at existing rates plus a fuel escalator clause, and the Bureau of Reclamation and Colorado River Commission plan to furnish Shasta power at much lower rates.

The Final Negotiations Resulting in Pacific's Offer to Lower its Rates in Order to Meet the Bureau Rates Under a Fifteen Year Contract, and Sierra's Acceptance of this Proposal

As we have seen, Mr. Tracy had so far refused to reply to Pacific's January 22nd offer. It was not until October 4, 1947 when he called on Mr. Wishon, the General Manager of Pacific, at the latter's office in San Francisco, that Mr. Tracy referred to that proposal. At this conference, Mr. Wishon repeated Pacific's proposal for a fifteen-year contract at existing rates, plus a fuel escalator clause. This offer was flatly rejected, and Mr. Tracy returned to Reno (Rec. pp. 631-2, 645-7).

On October 25, 1947, Mr. Sutherland, a vice-president, and other officers of Pacific came to Reno and met with Mr. Tracy and other representatives of Sierra at the latter's

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offices (Rec. pp. 647-8; 689-91). It was on that // date that for the first time Pacific acceded to Sierra's repeated demands, originally made to Mr. Pollard in May, 1946 (see pp. 6 and 7 of Exh. 11), that Pacific must reduce its rates to

Sierra if it wanted to retain its business.* Substantially lower rates were proposed and the provision for a fuel escalator clause was eliminated (Rec. pp. 649-50; 689-91). Moreover, Pacific proposed also that it would not only commence immediately with the construction of a new 110 kv line to Summit, but, when called on by Sierra during the proposed fifteen year contract, would undertake to build a second 110 kv line to bring additional power to Sierra, provided the contract would be extended for a further term of fifteen years commencing at the time of completion of this additional line (Exh. 5, 4th contract).

Mr. Tracy advised representatives of Pacific that he believed such a proposal might well be acceptable, and it was agreed that a form of contract embodying these proposals would be prepared by Pacific and submitted to Sierra (Rec. p. 651).

In the meantime, after the abortive meeting with Pacific's General Manager on October 4, Mr. Devore, Sierra's engineer, had been instructed by Mr. Tracy to make a study, described as "bogey" by Mr. Devore (Rec. pp. 733-4), of the anticipated increased demand with which Sierra would be confronted during the next fifteen years, so as to give Mr. Tracy a basis on which to estimate the actual cost of power under the various proposals which were then under con-

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At the meeting of Pacific's Advisory Committee on October 6. 1947 Mr. Wishon, reporting on his October 4th conference with Mr. Tracy, said " * * the Sierra Company is not prepared to continue negotiations at this time; that there is local political pressure to bring Shasta power into Nevada, which hampers the Company's negotiations; and that the Sierra Company cannot afford to offend Shasta power advocates in Nevada."

At this same meeting Mr. Black, Pacific's president, then asked if the P-31 rate schedule had been considered for Sierra and was told it had not been considered applicable. It was then decided to study its application to Sierra (Exh. 27, p. 4).

sideration. This "bogey" had been completed by Mr. [2309] Devore on October // 10th (Rec. pp. 687-8; 702-6). After receipt of a copy of the Bureau's proposed contract of October 21, 1947, Mr. Tracy directed Mr. Devore to make a further study indicating the cost of power under the rates proposed by the Bureau over a fifteen year period, in the light of his estimates of demand (Rec. pp. 654; 691-3). On December 10, 1947, he prepared this study, showing what the average cost of power under the Bureau's proposal over a fifteen year period commencing in 1948 would be (Rec. pp. 693, 720-26).

On December 12, 1947, Mr. N. R. Sutherland, a Vice-President of Pacific, sent Mr. Tracy copies of a proposed contract reflecting the proposals made at the meeting of October 25th (Exh. 11, p. 33).* Mr. Tracy immediately instructed Mr. Devore to make a study showing the cost of power to Sierra under this proposal over a fifteen year period on the basis of Mr. Devore's "bogey" (Rec. pp. 654-5, 694-8), and to advise Mr. Tracy as to the relative advantages and disadvantages of the two proposals in the light of both the cost of power and other pertinent circumstances (Rec. pp. 656; 693-5).

Shortly thereafter Mr. Devore concluded his rate studies, from which it appeared that over a fifteen year period beginning in 1948, power purchased from the Bureau would average about .55 of a mill less per kw hour than power furnished even under Pacific's new proposal (Rec. pp. 656; 696-7; 720-6).

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*The proposal was discussed by Pacific's Advisory Committee at its December 15, 1947 meeting (Exh. 27, p. 5). Pacific hoped to conclude an agreement with Sierra by the middle of December, 1947 (Exh. 27, pp. 4-5).

But Mr. Devore pointed out that despite the more favorable rate, there were a number of serious disadvantages to the Bureau's proposal. In the first place, there was the vital element of time. It was anticipated that existing facilities might be insufficient to furnish power in time to meet the

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anticipated 1948-49 peak load. // The Bureau did not believe that even if it received a Congressional appropriation without delay, it could construct the necessary lines to serve Sierra before 1951 or even 1952. On the other hand, Pacific had proposed to have its new 110 kv transmission line completed in time to meet this 1948-49 peak (Rec. pp. 656-7; 695-6). In the second place, as we have seen, no contract could be entered into by the Colorado River Commission with the Bureau until a contract had been entered into between that Commission and Sierra, and even then, the entire project was dependent upon obtaining necessary authorizations and appropriations from Congress to build the lines connecting Shasta with the Sierra system (Rec. pp. 685; 687). Finally, he pointed out that for several years the Bureau would have only a single line to Sierra which would probably require Sierra to make some arrangements for standby in case this line should break down, which would add greatly to the expense (Rec. p. 1010).

In view of these and other circumstances Mr. Devore recommended that despite the slightly higher rate Sierra should accept Pacific's proposal (Rec. pp. 694-8). Sierra's management accepted this recommendation and Mr. Tracy proceeded to work out the details of the proposed agreement with Mr. N. R. Sutherland, the Vice President of Pacific in charge of Public Relations and Sales (Rec. p. 657).

One of the provisions in Pacific's proposed agreement was that Sierra should agree not to construct any additional plants of its own or to purchase power from any other source than Pacific during the life of the contract. Mr. Tracy attempted to obtain a modification of this provision so as to enable Sierra to develop a project on the West Walker River

if it should prove desirable.* // However, Pacific refused to agree to this provision. (See letter, Tracy to Sutherland, February 5, 1948, Exh. 11, p. 37.) (Rec. pp. 657-8). Finally, the form of contract was agreed to and executed by both parties on March 4, 1948. Under it, Sierra was obligated to expend close to a million dollars for the extension of the new line from Summit to the Nevada border, as well as for a transformer bank to reduce the power from 110 kv to 60 kv (Exh. 5, 4th contract; Rec. pp. 657-60, 662-4). Moreover, in addition to the usual condition subsequent required by California law that its terms and provisions were subject to the Public Utilities Commission in the exercise of its jurisdiction, the contract also contained the condition precedent that it should not become effective until and unless the parties were authorized to carry out its terms by the California Public Utilities Commission (Exh. 5, 4th contract, Art. 12). At that time Sierra was Pacific's sole interstate resale customer (Rec. p. 816). As the proposed contract concededly offered less than fully compensatory terms, it was presumably thought that the Commission having primary interest in such a contract would be the California Commission, which would be primarily concerned in preventing any burden from the low rate falling upon Pacific's other customers, who were all intrastate. Clearly, a contract for the wholesale sale of power in interstate commerce at low rates could not, of itself, place any burden on that commerce. In any event, as we have seen, in addition to obtaining approval by the California Commission, the contract was duly filed with the Federal Power Commission.

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*Mr. Tracy also sought to reserve Sierra's right to purchase Bureau of Reclamation power in the future if an arrangement to wheel Boulder power could be worked out or if Federal power was developed in northern Nevada, and to permit Sierra to share in any cost savings which might result (Exh. 27, p. 5).

It is interesting to note that on February 4, 1948, after Sierra had decided to reject the Bureau's proposals and to accept Pacific's offer, the Bureau issued an elaborate report and study prepared by its Rates and Economics Section

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dealing with the retail cost of // electricity in northwestern Nevada, a copy of which is set forth at pages 28 to 49, inclusive, of Exhibit 21. The obvious purpose of this report was to induce Sierra and the officials of the State of Nevada to accept the Bureau's proposals. The report contains a comparison of costs of power to Sierra in the year 1946 under the existing contract with Pacific, and what those costs would have been if the power had been purchased from the Bureau. The report shows, that Sierra's total cost of Pacific's power was $477,679 or 8.42 mills per kilowatt hour, whereas the same power purchased from the Bureau under the rates offered by it would have cost only $345,074, or 6.08 mills per kilowatt hour, thus showing a saving of $132,605 (Exh. 21, p. 29). The seriousness of the efforts of the Bureau to induce Sierra to deal with it rather than with Pacific is conclusively established by an examination of this elaborate memorandum.

The Parties Were Authorized by the California Public Utilities Commission to Carry Out the Terms of the Contract After a Showing that the Low Rate and Long Term Were Offered by Pacific to Protect its Investment and "to Hold the Business".

As we have seen, the contract contained a condition precedent that it could not become effective until and unless the parties were authorized and empowered to carry out its terms by the California Public Utilities Commission. Accordingly, soon after the contract had been executed by the parties on March 4, 1948, Pacific filed its application with the Public Utilities Commission of California for such authorization. The hearing was held before Commissioner

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Craemer of that Com- // mission on April 15, 1948. In addition to representatives of Pacific and Sierra, there were representatives of both the Public Service Commission and the Colorado River Commission of the State of Nevada, as well as of a number of municipalities, merchants' associations, chambers of commerce, etc., from that State (Exh. 12, pp. A, 1-2, Rec. pp. 671-2).

As appears from the minutes of the hearing, which are set forth in full in Exhibit 12, Pacific called Mr. James F. Pollard, Manager of the Commercial Department, as its witness in support of the contract. After testifying that "* * * the purpose of entering into it [the proposed new contract] was to give better service to the Sierra Pacific Company and to retain its business" (Exh. 12, p. 12) Mr. Pollard pointed out that under the proposed new contract the rate for the year 1947 would have been .73 mills per kilowatt hour lower than under the existing 1938 contract, so that the new rate would have resulted in a saving in cost of power purchased from Pacific by Sierra for the year 1947 of $61,155 (Exh. 12, p. 13). He added that as Sierra's load factor was improved by growth of the load the rate would become still lower (Exh. 12, pp. 13-4). Mr. Pollard also testified that Pacific's reason for the fifteen year term of the contract was to "* * * guarantee that we would have business for a long enough period of time to warrant us in making the investment in the cost of the new line and amortizing it. And, furthermore, followed the same pattern as previous contracts we have had in each of which instances a substantial investment was made for service to this customer. And, similarly, 15-year contracts were taken at each of those times for that reason" (Exh. 12, p. 12).

Messrs. Tracy and Devore, President and Water Resources Engineer, respectively, of Sierra, also testified at

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this 1948 hearing in support of the contract. Mr. // Devore went into some detail in comparing the provisions of this contract with the provisions of the proposals submitted by the Bureau of Reclamation, explaining why he had recommended that the contract with Pacific be entered into despite the fact that according to his studies the rate under the Bureau's contract would be .555 mills less than that under the Pacific contract when extended over a fifteen year period (Exh. 12, pp. 35-9).

At pages 47 to 57 of Exhibit 12, Mr. A. M. Smith, State Engineer of Nevada and a member and Secretary of the Colorado River Commission, as well as a member of the Public Service Commission of Nevada, and the person with whom Mr. Devore had conducted a large part of his negotiations regarding possible purchase of power from the Reclamation Bureau, testified at some length to the effect that further study should be given to the possibility of obtaining cheaper power from the Bureau before entering into the proposed contract.

It must thus have been quite apparent to everyone present at that hearing that the low rate and the long term had been offered by Pacific, as Mr. Pollard put it "to hold the business" (Exh. 12, p. 12), in the light of the active competition of the Bureau of Reclamation and its supporters.

It was fully understood at the time the contract was approved by the California Commission that the rate was not fully compensatory, and that any loss resulting from this circumstance would be borne by the stockholders of Pacific and not by its other customers.

At the 1948 hearing both Mr. Pollard, Pacific's witness, and Mr. DuVal, its lawyer, brought out that whereas the rate under the 1938 contract had been substantially the

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same rate as that known as Pacific's P-6 // rate on file with the California Public Utilities Commission, the rates under the proposed 1948 contract were to be substantially the lower rates provided for under Pacific's filed schedule known as P-31 (Exh. 12, pp. 6-8, 20-1). The principal differences between the proposed contract and the straight P-31 filed rate were that Schedule P-31 provided for five year contracts whereas the present contract was to be for a term of fifteen years, and that Schedule P-31 did not contain any provision for a standby charge, whereas under the proposed contract Sierra was to pay Pacific $30,000 a year for standby (Exh. 12, pp. 8-9, 21). In addition, of course, there were also the provisions regarding the construction of new lines hereinabove referred to.

At page 22 of Exhibit 12, the record of the hearing on the 1948 contract, Mr. Wehe, representing the Staff of the California Public Utilities Commission, asked Mr. Pollard the following question:

> "Q. Mr. Pollard, can you state if the proposed contract were authorized by the Commission that your Company would be willing to accept the conditions imposed in the Commission's order I think that you quote as 38,305 in Case 4788 that authorized the establishment of Schedule P-31? A. What conditions do you refer to, Mr. Wehe? * * *.
>
> "Q. Specifically what I had in mind was that portion of the opinion which raised the question as to whether P-31 was fully compensatory, that it carried its full cost of service and if it did not that the burden would not become and lie on the other P.G.&E. customers? A. I think the Company would agree to that condition, yes, under those conditions" (Exh. 12, p. 22).

In order to properly understand the implications of these references to Schedule P-31 it becomes necessary to turn to

the hearings in Case No. 4788 held in Sep- // tember, 1945 before the California Railroad Commission, predecessor of the Public Utilities Commission, as a result of which Pacific's Schedule P-31 was authorized (Exh. 10).

At those hearings, Mr. Beckett, Rate Engineer of Pacific, testified in support of the proposed new rate (Exh. 10, p. 45). He pointed out that this was a revision of an earlier rate known as P-30 which had become effective in 1936 and which involved a general reduction to large industrial customers provided they would sign five year contracts.

> "* * * The purpose was to meet competition of Diesel engines and other isolated electric generating plants

> and to promote additional business (Exh. 10, pp. 61-2). "* * * I do know of my general knowledge and studies that it is better to hold any business at a somewhat reduced rate than not to hold it. The proposed P-31 fits logically into the Company's rate structure" (Exh. 10, p. 62).

At page 65 he stated that he did not believe the P-31 schedule as proposed would return to the Company its full allocated average cost of rendering the service, although "* * * from my general knowledge I am convinced that P-31 will more than cover those costs which can be saved if the business involved were lost" (Exh. 10, p. 66).

At page 67 Mr. Beckett was asked whether the filing of this schedule with its low rates, terms and conditions would impose an added burden upon the company's remaining customers:

> "A. No, sir. On the contrary, it will, eventually, through the rate making process, be beneficial to the Company's customers as well as to the Company. For the time being, until there is some general change in
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> rates obviously there can be no // burden upon them because their rates remain unchanged and the only effect of this reduction falls upon the Company and its stockholders" (Exh. 10, pp. 67-8).

Under cross-examination, at page 79, he repeated:

> "* * * The 5-year contract term is justified on the same grounds, that is, I mean the competition, namely, to protect existing business from competition, stabilize costs, make possible a rendering of better service at lower unit cost" (Exh. 10, p. 70).

At page 71, he again pointed out that it was better for the company to hold business than to lose it and have unused facilities provided "* * * the incremental revenue is more than the incremental cost" (Exh. 10, p. 71).

Following this hearing the California Railroad Commission, which at that time had jurisdiction over California public utilities, entered its Decision No. 38305 and order on October 16, 1945 (Exh. 9). Its opinion preceding the order, among other things, states:

> "At the hearing, witnesses for Pacific explained the circumstances which had given rise to the proposed rate reductions. It was pointed out that the United States Department of the Interior, Bureau of Reclamation, has publicly offered a schedule of rates for the sale of electric energy generated at its Shasta hydroelectric plant, * * *. Such resale rate offered by the Bureau was substantially lower than Pacific's presently effective resale rates for similar services" (Exh. 9, p. 345).

And, at page 348, the opinion continues:

> "Testimony given by witnesses for Pacific, as well

> as by the Commission's staff, indicates that // Schedule P-31 will not return all the costs which properly should be included if a full compensatory rate were being established" (Exh. 9, p. 348).

And at page 349:

> "It justifies the offer of reduced rate to resale customers primarily in order to safeguard existing business * * *.
>
> "It is clear that Pacific has the legal right to reduce its rates in order to meet in good faith the competitive rates being offered by the Bureau of Reclamation. This right has frequently been recognized by the Commission. Our precedents to such effect, as well as the judicial authorities, were cited in the case of Modesto

> Irrig. Dist v. Pacific Gas & Electric Co. * * *. However, as the Commission has clearly stated in that decision, as well as in many others, the loss, if any, incurred by a utility offering a competitively reduced rate, must be borne by the utility itself and will not be permitted to burden its other customers" (Exh. 9, p. 349).

It was fully understood at the time the contract was approved by the California Commission that the rate fixed was to remain unchanged for the duration of the contract.

That the rate fixed for the five-year contracts authorized under Schedule P-31 was intended to be firm for the duration of the contract is affirmatively established by the testimony of Mr. Beckett, rate engineer of Pacific, at the P-31 hearing in 1945. Under cross-examination, at page 76 of Exhibit 10, he testified as follows:

> "Q. * * * Then, from the customer's viewpoint it would probably follow that the sole reason that that
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> [2319]
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> customer would sign up for a 5-year con- // tract would be because of the opportunity to receive the lower rate under P-31 or P-30, isn't that right? A. Well, I would imagine that that would be—might be his reason right now, but I would think that he also might desire stabilization, *assurance that he will have service at this lower rate for a period of at least 5 years.*" (Emphasis supplied.) (Exh. 10, p. 76.)

That this was also the intent at the time Pacific's contract with Sierra was presented for approval to the California Commission in 1948, would seem equally apparent from the cross-examination of Mr. Devore, Sierra's engineer, by Mr. DuVal, counsel for Pacific, at page 43 of Exhibit 12. Mr. Devore had testified that he had compared the cost to

Sierra over a fifteen year period, to and including the year 1962, under the rates offered by the Bureau, with the rates offered by Pacific in the proposed contract (Exh. 12, pp. 36-7). Mr. DuVal evidently accepted this as a correct method of comparing rate provisions of the two proposals, for he questioned Mr. Devore as to whether, in making his comparison as to what the respective rates would be for the year 1962, he had taken into consideration the existence of a provision for standby in the Pacific contract, and the lack of such a provision in the Bureau's proposal.

That Mr. DuVal considered the rate provision to be binding for the duration of the contract, at least as recently as February 10, 1950, would also seem apparent from his statement to the California Commission at a hearing held at that time that it would be "double dealing repudiation" for Pacific, having entered into such a contract, to thereafter appear before the California Commission and ask that the contract rates be increased. See page 34, *infra.*

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The final proof that it was understood by those who participated in the 1948 hearing that the rate was to be firm is apparent from the formal letter filed with the Federal Power Commission in the present proceeding by the Public Service Commission of the State of Nevada (Exh. 22). It will be recalled that this Commission was represented at the 1948 hearing and that the Chief Engineer of the State of Nevada, who was also a member of that Commission, urged at that time that further opportunity should be given to study the possibility of obtaining power from other sources. In the letter which it submitted in the present proceeding the Nevada Commission said:

> "5—Had there been any doubt of the validity of the contract between the two companies, this Commission

> would have ordered Sierra Pacific Power Company to construct its own power stations on the Truckee, Carson, and Walker Rivers in Nevada and a steam plant to supplement the hydro power developed on those streams" (Exh. 22, p. 2).

As a result of the 1948 hearing an order was entered pursuant to which Pacific and Sierra were "* * * granted all necessary permission and authority to carry out the terms and conditions of the written contract dated March 4, 1948 * * * and deliver and charge for on the one hand and receive and pay for on the other, electric energy at the rates and under the conditions provided in said contract" (Exh. 13, p. 5). One of these "conditions provided in said contract" was that it should remain in effect for a period of at least fifteen years.

In 1949, Pacific again assures the California Commission that Sierra's contract had been entered into to meet competition from the Bureau of Reclamation, and asserts that it would be "double dealing repudiation" for Pacific to ask for an increase in the contract rates.

Less than two years after obtaining authorization of its 1948 contract with Sierra, Pacific filed its application with the California Commission, now known as the California Public Utilities Commission of California, requesting a general rate increase of 6%. In that application Pacific of its own volition requested that some twenty purchasers for resale which had straight five year P-31 contracts with Pacific should be exempted from the proposed increase, and during the course of the hearing sought and obtained permission also to exempt Sierra (Exh. 14, pp. 40-4).

At the hearing on this application, Mr. J. S. Moulton, Vice President and Executive Engineer of Pacific, testified in support of the application. After describing the existing five year contracts entered into under P-31, Mr. Moulton said:

> "* * * Because of the competitive conditions under which these contracts were negotiated, which reasons were recognized by the Commission in authorizing them, we believe that the contracts with all these cities and with the Plumas-Sierra Cooperative should be exempted from the requested increase" (Exh. 14, p. 42).

At page 44, he continues:

> "* * * There is one other similar contract which should be added to Exhibit K [the exhibit listing the customers to be exempted from the rate increase], in my
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> [2322]
>
> opinion. That is a 15-year contract // made with the Sierra-Pacific Power Company dated March 4, 1948, which was approved by this Commission in Decision No. 41,537 dated April 27, 1948. That contract was negotiated under conditions much the same as those which existed in the case of the Redding contract, and these other contracts which I have described" (Exh. 14, p. 44).

The Redding contract to which Mr. Moulton referred provided for a rate 10% lower even than the straight P-31 rate. This low rate had been approved because it was shown that the City of Redding was within ten miles of the Shasta Dam so that it would be easy for the City to purchase power directly from the Bureau of Reclamation (Rec. pp. 551-2). As a result, Redding's competitive position was so strong that they were offered a rate even lower than P-31 in order to hold the business (Exh. 16, pp. 1309-10).

Any remaining doubt on the issue of whether or not the present contract was entered into on a competitive basis in order to meet the competition from the Bureau, would seem conclusively to be laid at rest by the further testimony of Mr. Moulton under cross-examination at the same hearing. At page 541 of Exh. 15, in answer to a question as to why the contract with Sierra Pacific Power Company should be exempted from the proposed increase, he replied:

> "For the reason that I stated in my direct examination, Mr. MacKay. That goes largely to the fact that the contract along with the contracts such as with the City of Redding, which you heard something of this morning, were obtained under competitive conditions with those groups in Nevada which were actively interested in trying to get the Bureau of Reclamation to give service to the Sierra Pacific area in Nevada from
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> **[2323]**
>
> the Central Valley Project in California. We // finally made a 15-year contract with Sierra Pacific. We made a longer contract because we understood [sic] to build an additional line to supply them and we felt we needed that protection of a long contract. I am very sure that those competitive conditions existed then and that there is still agitation among certain groups in Nevada to get a line and that—
>
> Q. Do you think there was any reason for the Federal Government building a line over the Mountains to supply that area with electricity in view of the conditions that prevail, as far as the Government furnishing any similar type of energy to the people of California? A. Yes, I do.
>
> Q. What groups in Nevada, if you recall, what particular groups was it that acted in that behalf?
>
> A. It was either an official—I think, any [sic] official State body known as Nevada-Colorado River Commission. They held a series of meetings on that matter. Met with the Bureau of Reclamation representatives, according to the information that reached me. Also at

> that time two United States Senators in Nevada, Senator McCarren and Senator Maloney [sic] have both personally given time and attention to that matter" (Exh. 15, pp. 541-2).

It is difficult to see, in the light of this sworn testimony by their own Vice President and Executive Engineer, how Pacific can seriously assert today before the Federal Power Commission that the contract with Sierra Pacific was not entered into in order to meet competition from the Bureau of Reclamation.*

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Moreover, in his closing argument in support of these exemptions Mr. DuVal, counsel for Pacific, made the very arguments to the California Commission upon which Sierra now relies (Exh. 16, p. 1309):

> "* * * In essence, it was a question of holding the business or losing the business. The Company, in its judgment, concluded that all things considered, it was valuable to it and not a detriment to its customers that the endeavor be made to hold those customers on the lines. And for that reason, it did quote special rates. Most of those contracts, most of those customers are now under contract with the Company for a period of approximately 5 years, and in one or two instances, longer periods, so we have retained the customers. * * *

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*The accuracy of Mr. Moulton's statements is borne out by the minutes of the meetings of Pacific's Advisory Committee during the Summer and Fall of 1947, which show Sierra's refusal to negotiate with Pacific until the situation with respect to government power was clarified and the pressure on Sierra to deal with the government (Exh. 27, pp. 2-4).

Moreover, the minutes of the meeting of October 6, 1947 show that after Sierra had refused to negotiate further with Pacific because of the pressure to bring Shasta power to Nevada, Pacific decided to consider giving Sierra the lower P-31 rate which it offered on October 25, 1947 and which formed the basis of the contract (Exh. 27, p. 4).

> "In view of the fact that we have made these very recent contracts at somewhat reduced price, although most of them are P-31, with a minor adjustment * * * *I think anybody would agree that we would be accused of double dealing repudiation if we had, immediately after having made a contract with the City, then appeared before this Commission and asked that the rates be increased 6 per cent* * * *. A somewhat like situation obtains in respect to the other resale municipal customers. * * * The Commission authorized the Company to carry the contracts out in accordance with their terms, and the Company felt obligated that it should not apply for an increase in respect to those customers" (Emphasis added) (Exh. 16, pp. 1309-10).

He thus assured the Commission that under these P-31 contracts the Company was "* * * at least earning the out-of-pocket cost so that there will be no burden on the remaining customers" (Exh. 16, p. 1311).

On the basis of this testimony the Commission, in its order of March 21, 1950 approving the proposed general

rate increase, expressly authorized the exemption of Sierra and the other resale customers from the increase, saying:

> "In justification of the proposed exemption of the 16 resale customers, Pacific states that contracts with each have had the formal approval of the Commission; that the making of such special contracts was compelled largely by competitive conditions; that the contract rates are sufficiently compensatory to meet all direct costs of service; and that the retention of such customers for a term of years is of benefit to the utility and its customers as a whole" (Exh. 18, p. 9).

The order continues:

> "In authorizing Pacific to exempt certain resale customers from rate increases, we recognize the right

of a utility to meet competition. In approving such special contract rates in the past, we indicated that, if the revenue therefrom should fall below the cost of service, the loss would not be permitted to burden the other classes of customers. Pacific's witness stated that in his opinion the serving of these customers at the contract rates will not impose any burden on other customers, and that the contract rates are more than sufficient to meet the out-of-pocket costs including depreciation and return on facilities used exclusively for this service. There is no evidence in the record to the contrary" (Ex. 18, pp. 14-5).

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After Pacific had obtained all the benefits it was entitled to under the contract and all danger of competition had been eliminated, Pacific repudiated the position which it had so repeatedly asserted, denying that the contract was entered into in order to meet competitive conditions and asserting that the rate provisions can be changed at any time simply by showing that they do not produce a fully compensatory return.

As we have seen, when the contract in question was entered into in 1948, Sierra's bargaining position was based upon the possibility of obtaining power from sources other than Pacific. By 1952, this bargaining position had been substantially destroyed. Having entered into this contract and expended close to a million dollars in performance of its obligations under the contract, Sierra's position has now entirely changed. It would be highly uneconomical for Sierra to abandon this investment which, when made, represented 10% of its entire capital outlay, and seek other sources of power. And in any event the other potential sources of power which existed in 1948 had disappeared (Rec. pp. 666-70).

For in the meantime Pacific has entered into a ten year "wheeling agreement" with the Bureau of Reclamation under which all available surplus power from the Bureau's Shasta development, which otherwise could have been delivered to Sierra under the various plans hereinabove discussed, has been purchased by Pacific and is completely under its control (Rec. pp. 666-7, 943-5). The area within which the Shasta power will be "wheeled" by Pacific under this contract (shown on a map introduced in evidence at the hearing as Exhibit 25) is such as to make it impossible for Sierra to obtain any part of it (Rec. pp. 957-960). Indeed, at the hearing in this proceeding, when Commission Staff Counsel suggested that perhaps Sierra could still make

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some // arrangement to have Pacific wheel Shasta power to it, counsel for Pacific assured the Examiner that Pacific would not willingly wheel any Shasta power to Sierra (Rec. pp. 984-5, 957-60).

The other possible sources of additional power considered in 1948 likewise provide no serious threat at the present time. Present day construction costs make the construction of steam or diesel plants at Reno and the proposed West Walker River development prohibitive, and West Walker would concededly produce insufficient power to meet all of Sierra's present requirements, even though in 1948 it might have produced enough power to tide Sierra over during the shortages anticipated in the immediate future and until facilities to provide Bureau of Reclamation power could have been erected (Rec. pp. 668-70; 744-9).

Thus Sierra now has nowhere to turn except Pacific as a source of power.

Apparently a somewhat similar situation exists as to many of the communities in the State of California which have P-31 agreements with Pacific. Through the wheeling agreement Pacific has some control over the areas in which such Shasta power as is available to new customers will be delivered and, of course, the cost to these communities of constructing their own production facilities has now become prohibitive. The only community which still enjoys the same competitive position that it had when its contract was entered into is the City of Redding, which, as we have seen above, is situated within ten miles of the Shasta powerhouse, so that it could at any time purchase power directly from the Bureau without regard to the wheeling agreement.

Being thus relieved of the necessity to maintain low rates in order to "hold the business" of all of the other special contract customers, including Sierra, Pacific now seeks to

repudiate the solemn agreements to furnish // power at low rates which it had entered into when the loss of these customers through competition *was* seriously threatened. In 1952 Pacific applied to the California Public Utilities Commission for a general overall rate increase of about 18% in its rates to Sierra and to the local California P-31 contract customers which had been voluntarily exempted from the 1950 rate increase, but exempting the City of Redding on the express ground that it was still in a competitive position (Exh. 17, p. 39). At the hearing on this proposed increase Pacific made no effort to show that these contracts had become such a burden that they interfered with Pacific's ability to carry out its proper purposes and were therefore against the public interest. On the contrary, the only effort made by Pacific was to attempt to argue that the contracts had not been entered into to meet competition at all. See, for example, counsel's objections to testimony by Mr. Tracy at that hearing that the Sierra contract had been entered into under competitive conditions, at pages 1398-1403 of Exhibit 23. Evidently, however, the California Public Utilities Commission remembered the circumstances under which it had approved Schedule P-31, as well as Sierra's present contract. No doubt the Commission also remembered the position taken by Pacific at the hearing only two years previously, when Pacific itself urged that the special resale contract to customers be excluded from the 6% rate increase which it was then seeking. For the California Commission, although approving Pacific's proposed general increase, expressly exempted the special resale contracts, including Sierra, from the increase. Of Sierra, the Commission at page 40 of the opinion preceding its order (Ex. 17) said:

> "*Special Resale Contracts*
>
> Among the special resale contracts which applicant
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> [2329]
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> seeks to alter in this proceeding is one in- // volving the sale of electric energy at wholesale to Sierra Pacific Power Company at the Sierra summit. The present contract, dated March 4, 1948, was approved by this Commission in Decision No. 41537. This agreement was a renegotiation of prior contracts extending as far back as 1923 covering this point of delivery. The contract covered, in addition to rate structure, other features of delivery including building of additional lines on the part of both parties and the establishment of a contract term of 15 years to provide protection to both parties. This contract was concluded after negotiations extending over about a year's time. The pro-

testant, Sierra Pacific Power Company, makes the point that if conditions are shown to justify a change in the rate, which conditions it denies have been shown, then the contract rates might be altered but that such alteration should be made by agreement of the parties and submitted as previous contracts have been for approval by this Commission" (Exh. 17, p. 40).

After discussing several other similar contracts and showing why they should also be excluded, the Commission stated that it felt that the parties should be given an opportunity to negotiate a change, and continued (pp. 41-2):

"* * * The revenues from these services will be computed at the new resale schedule for the purpose of determining applicant's over-all revenue requirements only, but the rates for such resale contract customers will not now be increased. By this method no burden will be placed on the other classes of customers but any burden will fall on the stockholders' portion of the earnings until such time as the contracts may have been renegotiated and have been authorized by the Commission. No special exemption from this method of treatment will be made for the City of Redding resale contract.

In connection with these special contracts, we point out that the applicant, in order to forestall alleged government competition, requested authority from this Commission to enter into said contracts with the clear understanding that its stockholders must bear any burden which the applicant might sustain as a result of the operation of any such contracts. Therefore, equity calls for the treatment which we have accorded to these special contracts" (Exh. 17, pp. 41-2).

It is thus apparent that any loss resulting from the low rates unders the existing contracts will fall on the stockholders of Pacific and not upon other customers.

Pacific's Position in the Present Proceeding.

Having failed to induce the California Commission to assist its effort to repudiate its obligations under the agreement while retaining all its benefits, Pacific now applies to this Commission for assistance in its scheme of "double dealing repudiation". Again, Pacific does not seek this increase on the ground that the contract rates have become so burdensome that the public interest requires an increase. Its own presentation negatives any such inference. On the contrary, Pacific seeks the present increase solely on the ground that the new proposed rates are "reasonable", and asks that, except for the rate increase, the contract remain in force (Exh. 1, p. 1). Moreover, in an effort to justify its action it again takes the extraordinary position that the contract in question was not entered into on a competitive basis (Rec. pp. 27-8) and that there had never been any agreement that the stockholders should bear any loss resulting from the low rate (Pacific's Answer, April 10, 1953, p. 4). It is difficult to find any serious basis for such denials in view of the repeated assertions and testimony by Pacific's own officials produced by Pacific

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itself before the California Commission which we have herein above set forth, and of the repeated statements by the California Commission itself, that the low rates had been authorized in order to meet competition, and on the condition that the stockholders would bear any burden resulting therefrom.

During the course of the hearings Pacific's witness Pollard at first made a valiant attempt to support his employer's newly assumed position, even to the extent of contradicting the earlier sworn testimony of company officials and asserting that the contract had not been entered into in order to meet competition (Rec., pp. 308-9, 314-16, 343-6). However, he was forced to admit, as he had testified at the 1948 hearing approving the contract, that the contract with its low rate was entered into in order "to retain the business" (Rec., pp. 321-3), and was wholly unable to give any explanation of the distinction between offering a low rate in order "to retain business", and "in order to meet competition" (Rec., pp. 322, 352-3). Finally, when Vice President Moulton's detailed testimony that the contract had been offered in order to meet competition from the United States Bureau of Reclamation was read to him, Pollard reductantly admitted that "There was some threat of competition * * *" (Rec. pp. 355-58).

In his earlier testimony, Pollard attempted to explain the offer of the P-31 rate by saying that it had been "established" as the rate for special contracts with resale purchasers, (Rec. pp. 317-8) so that it was "made available" to Sierra (Rec. pp. 323-4). The short answer to that assertion is that despite the existence of Schedule P-31 as an approved rate from 1945 until after this present contract was entered into, Pacific had never once offered it to Sierra, but on the contrary, had repeatedly demanded a renewal contract for fifteen years at existing rates which, as we

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have seen, were // substantially Schedule P-6, and were significantly higher rates than those "available" under Schedule P-31. Moreover Mr. Tracy testified that the only time he ever heard P-31 mentioned by Pacific representatives prior to the meeting on October 25, 1948, at which that rate was finally offered, was at the 1945 hearing at which Pacific was seeking approval of its P-31 rates. He said that he remembered at that hearing "[T]he remark was made to me at that time that that rate was not for our company" and that this was said by one of the officials of Pacific (Rec. pp. 650-1).*

Under cross-examination by counsel for the Commission Staff, Pollard admitted that at the time the 1948 contract was entered into "* * * it was not regarded as providing a full and fair return, including full return on investment, * * *" (Rec. p. 814). His first attempt to explain why this low P-31 rate was offered was to argue again that the rate was offered "* * * because it was the resale rate that we had on file at that time for customers of this class" (Rec. p. 815). When pressed further for an explanation of why Pacific had reduced its earlier demands, he said that "* * * in the final clinches of these negotiations, we agreed to substitute P-31, our general resale schedule, for the previous rate that had been offered, including the absence of a fuel oil clause" (Rec. p. 820). At page 824, he agreed that the transaction with Sierra in 1948 "* * * was in many important respects unique", and concluded:

> "I think the record is clear in this case that Mr. Sutherland conferred with the officers of Sierra Pacific at a time when I was not present, and he was the one

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*In connection with Mr. Pollard's testimony regarding the offering of P-31 to Sierra it should be noted in the minutes of the meeting of Pacific's Advisory Committee on October 6, 1947 that Mr. Black, Pacific's president, asked if P-31 had been considered for Sierra and was told it had not been considered applicable. It was then agreed that its application to Sierra would be studied (Exh. 27, p. 4).

> who offered that compromise, // so I would have to make an assumption as to what was in his mind in making the offer" (Rec. pp. 825-6).

Thus there is not a shred of evidence from which even an inference could be drawn in support of Pacific's present contentions that the present contract was not entered into to meet competitive conditions, that it was not recognized by all at the time it was entered into that the rates provided thereunder were less than compensatory, and that it was not the understanding of all parties that, provided the incremental revenues from this rate were sufficient to meet actual incremental costs of the service rendered, any loss resulting from the low rate would be borne by Pacific's stockholders, and not by its other customers (Exh. 10, pp. 67-8, 71; Exh. 12, p. 22). Indeed, these propositions appear to us so overwhelmingly established by the record that we find it difficult to understand how Pacific can seriously undertake to assert any different conclusion.

Argument

We submit that the following facts are established beyond the possibility of argument by the record herein: that the rates specified in the contract were concededly less than fully compensatory at the time the contract was entered into, although such return was, and still is, greater than the actual out-of-pocket cost which could be saved if Sierra's business were abandoned; that these low rates were offered by Pacific for the purpose of meeting competition and retaining Sierra's business; that any loss resulting to Pacific on account of such low rates will be borne by Pacific's stockholders and not by its other customers; and that the fifteen year term was included not only to insure that Pacific would [2334] retain // the business for a long enough period to justify the investment required by the contract, but also as an inducement to Sierra to enter into the contract by ensuring that it would receive the low rates at least for the duration of the contract.

It is Sierra's contention that such a contract, having been expressly approved as to all its terms by the California Commission, which at the time had exclusive jurisdiction of all of Pacific's other customers, and having been duly filed with the Federal Power Commission, is a legal and binding contract which cannot be abrogated either in whole or in part under the Federal Power Act without an express finding that the terms of the contract have become so burdensome upon Pacific that the public interest requires a modification.

In support of this contention we shall show: (I) The contract is a legal and binding agreement which cannot be abrogated against the wishes of either party in the absence of proof that its terms have become injurious to the public interest; (a) as a matter of simple contract law it is clear both from the terms of the contract itself and from the circumstances under which it was entered into that it is a valid and existing contract and that all of its terms and conditions are binding upon the parties for its duration; (b) within the meaning of the Federal Power Act the contract is a legal and binding agreement which can only be abrogated or modified upon a showing that it is so unreasonable that the public interest requires modification; (1) cases holding that under certain statutes contract rates are automatically superseded when in conflict with general rate schedules fixed by Commissioners are inapplicable to the present situation; (2) under a statute such as the Federal Power Act contract rates can only be modified if the contract is found to be injurious to the public interest; (c) quite apart from

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the language of the Federal Power Act, the // present contract having been expressly approved by the California Commission and filed with the Federal Power Commission, is a valid and legal contract which can only be modified or abrogated upon a finding that it is injurious to the public interest; (d) the proper procedure for modifying a valid and existing rate contract under the Federal Power Act is by an application under Section 206(a), and not by the filing of a proposed new schedule under Section 205(d). (II) It is in the public interest that the present contract be maintained in full force and effect, at least as long as Pacific earns more under the contract than it would save if Sierra's business were lost or abandoned.

Point I

The contract in question is a legal and binding agreement which cannot be abrogated against the wishes of either party in the absence of proof that its terms have become injurious to the public interest.

A

As a matter of simple contract law it is clear both from the terms of the contract itself and from the circumstances under which it was entered into that it is a valid and existing contract and that all of its provisions are binding upon the parties.

Barring for the moment any problems raised by existing State and Federal rate-making statutes and the cases interpreting such statutes, we think it is quite clear as a matter of contract law that the present contract is binding on both parties for the full period of its existence, as to all of its

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terms, including the pro- // vision fixing the rates. The provision to this effect in article 11 could hardly be more explicit:

> "This agreement shall be and remain in full force and effect until December 31, 1964, or fifteen (15) years after the date when the first 110 kv line goes into service, whichever is later, unless extended as herein provided * * *." (Exh. 5, 4th Contract)

Apparently Pacific agrees that this article applies to every provision of the contract except the rate provision, for in its application herein Pacific expressly requests that the contract remain unchanged in every other respect. We are not aware of any provision of the contract which could be interpreted as supporting a contention that the rate provision stands on any different footing than any other provision.

If there had been any intention that the rate should be changeable at any time by the normal rate-making process, the contract surely would have contained a provision to that effect, such as that contained in Pacfic's contract with California-Oregon Power Company, which is in evidence as Exhibit No. 6. Paragraph 4 of that contract, after setting forth the rates in detail, contains the following paragraph:

> "If, as and when the Public Utilities Commission of the State of California shall (A) authorize, approve or order increases or decreases in Pacific's resale Schedule P-31, copy of which is attached hereto; or (b) fix and order some other schedule of rates to be established by Pacific in lieu of said Schedule P-31 for resale

> service by Pacific, then the above schedule of rates shall be increased or decreased commensurately therewith" (Exh. 6, p. 4).

We submit that the absence of such a provision in Pacific's contract with Sierra is the most eloquent proof

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that Mr. Beckett, Pacific's rate engineer, was correct when he stated that the five-year term contract rates provided for under Schedule P-31 were intended to be binding "for a period of at least 5 years" (Exh. 10, p. 76), and that Mr. DuVal, Pacific's counsel, was equally correct when he stated that any attempt to increase the rates after such a contract had been entered into would constitute "double dealing repudiation" (Exh. 16, p. 1310). Obviously, if Pacific had intended the rates in the present contract to be subject to modification at any time by the California Commission, the contract would have contained the same clause as that which they wrote into the contract with California-Oregon. We think it is equally obvious from the record in this case that if there had been such a clause in this contract, Sierra would have rejected it. As we have seen, Sierra flatly rejected Pacific's offer of a fifteen year contract containing a fuel escalator clause, and the Public Service Commission of Nevada, which has jurisdiction of Sierra's retail sales, in opposing Pacific's present application before this Commission has stated:

> "Had there been any doubt of the validity of the contract between the two companies, this Commission would have ordered Sierra Pacific Power Company to construct its own power stations on the Truckee, Carson, and Walker Rivers in Nevada and a steam plant to supplement the hydro power developed on those streams" (Exh. 22, p. 2).

We think the question in this case, therefore, is not whether the contract was intended to and by its terms did provide for the furnishing of power at fixed rates during its term, but whether and under what circumstances this Commission as a matter of policy should, and as a matter of law may, increase those rates without Sierra's consent.

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B

Within the meaning of the Federal Power Act the contract is a legal and binding agreement which can only be abrogated or modified upon a showing that it is so unreasonable that the public interest requires modification.

In support of the contention that the rate provision in the present contract was subject to modification from time to time in accordance with ordinary rate-making procedures, counsel for Pacific at the hearing pointed to the next to the last sentence in article 12 of the contract:

> "This agreement shall at all times be subject to such changes and/or modifications as [the Public Utilities Commission of the State of California] may from time to time direct in the exercise of its jurisdiction" (Exh. 5, 4th contract).

But this provision, which is required to be included in every special public utility contract by California law is no more than a restatement of existing law, Public Utilities Commission, State of California, General Order 96, Section X. It is conceded by all parties that every contract made by a public utility is subject to modification by public utility or power commissions acting in accordance with their respective statutory authority, regardless of the presence of such a clause. Even though the contract does not so provide in express terms, we concede that this contract is also "subject to such changes and/or modifications as" the Federal Power Commission "may from time to time direct in the exercise of its jurisdiction". The California Commission having in 1952 expressly refused to exercise its jurisdiction to modify the contract (Exh. 17), the question now presented is whether and under what circumstances the Federal Power Commission should or can do so.

We think it is quite apparent from a study of the leading cases dealing with this subject that in the last analysis the answer to that question will be found in the language of the Federal Power Act.

The Contract Clause and the Fifth Amendment to the Constitution have neither been amended nor weakened either by the passage of the Federal Power Act or the many State statutes dealing with rate regulation. While the law is clear that public utility rates may be fixed by governmental commissions, and that rates contained in private contracts may be superseded by such rates when it is found that the public interest so requires, it is also still the law that a valid contract constitutes a property right which cannot be abrogated by State or Federal action unless it is found that the public interest does so require. As was said by the Supreme Court of the United States in *Arkansas Natural Gas Company v. Arkansas Railroad Commission*, 261 U.S. 379, at page 383:

> "The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed the exertion of legislative

> power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist *per se. It is the intervention of the public interest which justifies and at the same time conditions its exercise."* [Emphasis in last sentence supplied.]

The problem then is to find whether the contract is a valid contract within the meaning of the Federal Power Act, and if so, under what circumstances it can be abrogated or modified.

We think that on examination the cases dealing with this

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subject will be found to fall into two categories, // depending primarily upon the interpretation of the particular statute under consideration. Some States, in the exercise of the police power, have enacted statutes providing that only rates fixed by Public Utility Commissions are legal. Under such statutes it has been held that upon the fixing of such rates, all contract rates coming in conflict therewith are automatically superseded. Examples are *Union Dry Goods Co. v. Georgia Public Service Corp.,* 248 U.S. 372, and *Midland Realty Co. v. Kansas City Power & Light Co.,* 300 U.S. 109. Other statutes, while providing that Public Utility Commissions shall have jurisdiction over all utility rates and that all such rates shall be reasonable and nondiscriminatory, etc., do not automatically abrogate existing contract rates, but provide machinery whereby they may be superseded when found to be unreasonable or discriminatory. The leading case dealing with such a statute is *Wichita Railroad & Light Co. v. Public Utilities Commission,* 260 U.S. 48. It is our contention that the Federal Power Act falls in the latter category.

1. Cases holding that under certain statutes contract rates are automatically superseded when in conflict with general rate schedules fixed by Commissions are inapplicable to the present situation.

In *Union Dry Goods v. Georgia Public Service Corp.*, 248 U.S. 372, *supra,* the statute provided that:

> "* * * the power to determine what are just and reasonable rates and charges is vested exclusively in said Commission * * * provided, however, that nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company * * *." (Georgia Acts 1907, Part I, Title 6, § 5)

The contract in question, not being with a municipality, did not come within this exception. Accordingly, "the power to determine what are just and reasonable rates and charges" between the Union Dry Goods Company and the Georgia Public Service Corporation was "vested exclusively in said Commission". The contract had never been approved or filed with that Commission, and the Supreme Court held that under that statute, the contract rates must yield whenever the Georgia Commission issued an order fixing a general schedule of "just and reasonable rates". After citing many cases, the Court concluded:

> "These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare *when determined in an appropriate manner by the authority of the State* * * *." [Emphasis supplied] (248 U.S. 372 at 377)

In the *Midland Realty* case, 300 U.S. 109, *supra,* the purchaser under a private contract, again not filed with or approved by the State Commission, sought to enforce its contract rates as against a general schedule of higher rates promulgated by the Commission, claiming the protection of the Contract and Due Process clauses of the Constitution. The Supreme Court said:

> "These questions are to be decided upon the construction that the state supreme court put upon the [state utilities] statute. And that law is to be taken as if it declared that rates made in accordance with its provisions shall supersede all existing contract rates." (300 U.S. 109 at 113)

Paragraph 2 of Section 5189 of the Revised Statutes of Missouri of 1929 provided that

> "No gas corporation, electrical corporation * * * shall **[2342]** directly or indirectly * * * charge, demand, // collect or receive from any person or corporation a greater or less compensation * * * than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service * * *."

Thus the statute in terms forbids all "special" contract rates, so that, as the Supreme Court of the State of Missouri held, rates fixed by the Commission "automatically supersede all rates coming into conflict therewith" (*Kansas City L. & P. Co. v. Midland Realty Co.,* 338 Mo. 1141 at 1147). The Supreme Court of the United States held that under that statute:

> "It is clear that, as against those specified in the contract here involved, the rates first filed by plaintiff and those promulgated by the commission in accordance with the statute have the same force and effect as if directly prescribed by the legislature." (300 U.S. 109 at 114)

But the provisions of the Federal Power Act are of a very different nature. Whereas the Missouri statute forbade any utility to charge any customer "any greater or less compensation" than it charged others, the Federal Power Act, in Section 205(b), forbids only "any *undue* preference or advantage" or "any *unreasonable* difference in rates", and sets forth the procedures under which the existence of such "undue preference" or "unreasonable difference" shall be determined and corrected. Thus, the Act did not contemplate that existing rates would automatically be superseded by Commission rates. On the contrary, the Federal Power Act by its terms clearly contemplates that existing contract rates shall continue in full force and effect until and unless they are changed in accordance with the provisions of that Act. Thus Section 205 (d) provides that no public utility may change its existing rates "or any contract relating thereto", except upon notice and,

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if so ordered // by the Commission, after a hearing. As we shall point out hereafter, we believe that this provision is applicable only to a modification of a contract which has been previously agreed to by the parties, and that the provisions for changing a contract without such agreement are contained in Section 206(a), which reads as follows:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate * * * or contract affecting such rate * * * is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate * * * or contract to be thereafter observed and in force, and shall fix the same by order" (16 U.S.C. § 824e(a)).

Regardless of which of these provisions is applicable to the present case, we submit that no one can argue, and we are quite confident that no court has ever held, that this statute automatically abrogates existing contract rates. For the Act in terms expressly recognizes the existence of contract rates and prescribes when and under what circumstances they may be modified or abrogated.

2. Under a statute such as the Federal Power Act, contract rates can only be modified if the contract is found to be injurious to the public interest.

We submit that the rights of the parties and the powers of the Federal Power Commission under the Federal Power Act are governed by the decision of the Supreme Court in *Wichita Railroad & Light Co. v. Public Utilities Commission,* 260 U.S. 48, *supra.* In that case, the Supreme Court was confronted with a statute (Public Utility Law of Kansas, c. 238, Sess. L. 1911) which is in all respects similar to, if not identical with, the provisions of the Federal Power

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Act. That // statute, like Section 206(a) of the Federal Power Act, *supra,* set up procedures whereby existing rates could be changed and reasonable rates substituted in lieu thereof whenever they were found to be "unjust, unreasonable, unjustly discriminatory or unduly preferential" (Pub. Util. L., Kans., *supra,* § 13). It also contained a provision analogous to Section 205(d) of the Federal Power Act, whereby public utilities desiring to make a change in rates could file a schedule of new rates which would become effective within thirty days after approval by the Commission (Pub. Util. L., Kans., *supra,* § 20). The Supreme Court of Kansas, in interpreting this statute, had held:

> "The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract" (*Kaul v. American Independent Telephone Co.,* 95 Kan. 1 at 4).

The Supreme Court of the United States, after reciting the provisions of the Kansas statute, reached a similar conclusion, holding that "* * * the filing of a schedule of changed rates under § 20 [the section analogous to Section 205(d) of the Federal Power Act] cannot accomplish the result of abrogating contract rates" (260 U.S. 48 at 56).

After discussing the provisions of the Act requiring a full hearing and a finding that the existing rates are unjust and unreasonable before they can be changed, the Court concluded:

> "We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State." (260 U.S. at 59)

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We know of no case which either overrules or in any way lessens the effect of this decision. Surely such decisions as that in the *Midland Realty* and *Union Dry Goods* cases, *supra,* can have no bearing upon a case arising under a statute such as that considered in the *Wichita* case or under the almost identical provisions of the Federal Power Act. It follows that the rates under the existing contract can only be abrogated or modified after a finding that the existing contract is unreasonable and injurious to the public interest.

C

Quite apart from the language of the Federal Power Act, the present contract, having been expressly approved by the California Commission and filed with the Federal Power Commission, is a valid and legal contract which can only be modified or abrogated upon a finding that it is injurious to the public interest.

Another and equally valid ground of distinction between the present situation and that passed upon by the Supreme Court in the *Midland Realty* and *Union Dry Goods* cases, is the fact that the present contract was itself made subject to prior approval and authorization by the California Commission, and was duly filed with the Federal Power Commission. As we have seen above, in addition to the general provisions subjecting it to the jurisdiction of the California Public Utilities Commission, this contract contained the condition precedent that it could not become effective until the parties had been authorized to carry out its terms and conditions by that Commission. Thus, we submit that at least in so far as the California Commission was concerned, even if the California Public Utilities Law (Public Utilities Code Annotated, 1951, Chapter 4, Article 2) were

subject to the interpretation that rates fixed // by the Commission automatically abrogated existing contracts rates, such as was placed upon the Missouri statute in the *Midland Realty Co.* case, *supra,* the present contract would still be a valid and subsisting contract which could not be set aside without a finding of unreasonableness. For surely a Commission having power to fix all rates that shall be charged for electricity within its jurisdiction must have power to permit a utility to enter into a valid contract to charge a special rate for a specific term of years for special reasons. As we shall see in a moment, there seems to be no question of public policy to forbid such an agreement, and as a matter of law the existence of the power to permit such an agreement would seem to be inherent in the broad rate-making powers of such a Commission. Having approved the rate contract, it surely becomes a valid contract binding in accordance with its terms, subject only to the Commission's right to set it aside because it had become injurious to the public interest.

To be sure the present contract did not contain a similar condition precedent requiring express approval by the Federal Power Commission. We assume this was because at the time the contract was entered into Sierra, which purchased only about 1½% of Pacific's total electric output, was the only interstate customer to which Pacific sold power. The burden, if any, of the low rates provided by the contract would therefore fall entirely upon Pacific's other customers, all of whom were intra-state and therefore within the exclusive jurisdiction of the California Commission. There would seem to be no reason to obtain express authorization from the Federal Power Commission to carry out a contract to sell power at less than a fully compensatory rate to an interstate wholesale purchaser, when the State Commission having jurisdiction of the only customers

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who might be adversely affected by such // a rate approved the contract. It must also be remembered that in 1948, many utility lawyers were of the opinion that the jurisdiction of the Federal Power Commission arose only when there was a disagreement between two State Commissions. As we have seen above, the Nevada Commission was present at the 1948 hearing before the California Commission and withdrew its objections to the contract (Exh. 13, pp. 4-5).

In any event, the contract in question was duly filed with the Federal Power Commission and therefore stands in a totally different situation from the contracts passed on by the Court in the *Midland Realty* and similar cases. For in none of those cases had the contract been either approved or filed with any Commission, and the decision in each case was based upon a holding that, as against a rate legally promulgated and filed by the Commission, private contract rates are illegal and void. No one can argue that in the present situation the rates now being collected from Sierra by Pacific under the existing contract are illegal or void, so that those decisions have no application to this situation at all. The only question is how an existing legal rate contained in a special contract such as that here in issue can be changed. As we have just seen, the law is quite clear that no such legal and existing contract can be modified in the absence of a finding that it is against the public interest.

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D

The proper procedure for modifying a valid and existing rate contract under the Federal Power Act is by an application under Section 206(a) which requires proof that the contract is against the public interest, and not by the filing of a proposed new Rate Schedule under Section 205(d).

It has been Sierra's contention from the outset in the present proceeding that the proper procedure for abrogating or modifying a valid and existing contract such as the present one, is that set forth in Section 206(a) of the Federal Power Act. Although Commission Staff disagrees with us, and the Commission has sustained Commission Staff's views, we still believe it appropriate to call to the Commission's attention our reasons for this contention, in the light of the foregoing discussion of the applicable substantive law.

If we are correct in our contention that the Federal Power Act is governed by the decision of the United States Supreme Court in the *Wichita* case, 260 U. S. 48, *supra,* it seems to us that as a matter of law it is mandatory for the Commission to proceed only under Section 206. For the Supreme Court held in that case that "the filing of a schedule of changed rates under" Section 20 of the Kansas statute, *supra,* which is analogous to Section 205(d) of the Federal Power Act, "cannot accomplish the result of abrogating contract rates", and continued, "the consent of the Commission in § 20 is made necessary only to prevent changing schedules without notice to the Commission and thus to secure a proper supervision of schedules" (260 U. S. 48 at 56). We think it is clear from this that the purpose of Section 205(d) is to prevent parties from changing existing contract rates by mutual agreement, without the knowledge or consent of the Commission.

We think that the proper procedure for changing a contract without such consent is so clearly set forth in Section 206(a) that we find it difficult to see any good reason why that section should not be used for that purpose. For it provides that:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate * * * or that any contract affecting such rate * * * is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate * * * or contract to be

> thereafter observed and in force, and shall fix the same by order." (16 U.S.C. § 824e(a))

If that language is not intended to cover such a situation as the present, its meaning and purpose escape us. As the Supreme Court of the United States said in the *Wichita* case, *supra:*

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective." (260 U. S. 48 at 59)

As we understand it, the position of Commission Staff is that our objection is only procedural and that it is still open to Sierra to raise the substantive objections which are raised herein upon a proceeding under Section 205(d). In-

deed, the Commission's order denying // Sierra's motion to dismiss the application because it was improperly brought under Section 205 expressly reserves this right to Sierra. It would seem, therefore, that so far as the present proceeding is concerned, Sierra's rights are adequately preserved. We assume that if the Commission agrees with our analysis of the substantive law as hereinabove set forth, it will now reject Pacific's application because Pacific has not shown that the existing contract is unreasonable.

However, we desire to point out most respectfully what seems to us to be a clear advantage in insisting that proceedings of this nature be brought under Section 206 rather than under Section 205. For example, had an order to this effect been issued by the Commission in the present instance, we believe it would have put an end to the proceeding, and would have avoided the necessity of the extended hearings held herein. For we do not believe that Pacific could possibly have undertaken to file an application under Section 206(a) based upon the allegation that conditions had so changed that the present contract had become unreasonable and against the public interest, in the face of the indisputable record which as we shall show in a moment, conclusively establishes that the contract is no less advantageous to Pacific today than it was at the time it was entered into.

It would seen, therefore, that in a situation such as that here presented, Section 206(a) not only provides that appropriate procedure from a legal standpoint, but would seem also to provide a more orderly and expeditious procedure for disposing of the controversy, than does Section 205(d).

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Point II

It is in the public interest that the present contract be maintained in full force and effect, at least as long as Pacific earns more under the contract rate than it would save if Sierra's business were lost or abandoned.

We have seen that the existing contract between Pacific and Sierra is a legal and binding contract which, under existing law, can only be modified or abrogated upon a showing that it is so unreasonable, unjust and burdensome that the public interest requires that it be modified or abrogated. Pacific has neither alleged nor attempted to prove that the contract rates are in any way injurious to the public interest. It has merely alleged and offered proof that the proposed new rate schedule will produce no more than a reasonable return on Pacific's investment. Under these circumstances, we respectfully submit that as a matter of law Pacific's application should be dismissed for failure of proof.

Quite apart from any legal considerations, we submit also that it is in the public interest that the present contract should not be modified or abrogated at this time. We assume that a special contract at low rates entered into in good faith for the purpose of meeting competition is no more against public policy under the Federal Power Act than it is under the decisions of the Public Utilities Commission of the State of California. (*Modesto Irrigation District v. Pacific Gas and Electric Company,* 36 Cal. R. C. R. 766, PUR 1932 B 203 at 208). No public purpose would seem to be served by presenting a public utility, which has a substantial investment in transmission lines and other facilities constructed solely for the purpose of rendering service to

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a particular customer, from offering rates // which, while providing substantially less than a so-called "fair return" on its total investment, are at least sufficient to produce a greater return than the amount of money that would be saved if the business were lost, when, in the judgment of the utility's management, such low rates are necessary in order to retain the business. Certainly Pacific's officials have made it clear in their several appearances before the California Commission that in their view it was of benefit to the company as a whole, including its other rate payers, to enter into such a contract.

The only harm such a contract could do from the standpoint of the public interest would arise either if the burden of low rates were borne by other consumers of the utility, or if the rate were so low that it would be more profitable to the utility to abandon the business and lose its investment than to continue rendering the service at those rates.

We think it is apparent from the record that neither of these conditions exists here. The California Commission has taken steps to insure that any loss will fall only on the stockholders (Exh. 17, pp. 41-42) and Pacific's initial presentation (Exh. 4, p. 1a) expressly shows that the return to Pacific under the existing contract, after paying all properly allocable charges, is still sufficient to show a profit of 1.2% on an undepreciated rate base or 0.7% on a depreciated rate base on the entire operation. Moreover, the present rates provide a return on a depreciated rate base of 2.6% when the return is computed in accordance with the methods prescribed by the Federal Power Commission (Exh. 19, p. 1). Thus, Pacific's return at the contract rate is concededly greater than the amount that Pacific could save if it lost the business.

That Pacific still considers that even a lower return than

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that provided for in this contract is more advan- // tageous to it than would be the loss of existing business, is apparent from the action of Pacific in voluntarily asking that its contract with the City of Redding be exempted from the general rate increase which it sought from the California

Commission in 1952. It will be recalled that the City of Redding's contract provides for a rate even 10% lower than that provided for in the present contract. Yet Pacific urged that this low rate be maintained, and the contract exempted from the general rate increase, on the express ground that the City of Redding, being only ten miles from the Shasta Dam, still maintained its original competitive position.

On this record and in view of the action of the California Commission by its order of October 15, 1952, it is apparent that the only interest that can in any way be adversely affected by the present contract is that of Pacific's stockholders. We do not assume that the public interest requires the intervention of this Commission to protect those stockholders from the consequences of a contract which they voluntarily entered into for good and valid consideration after they had obtained all the benefits of that consideration. On the contrary, it would seem to us that the particular public interest in which the Federal Power Commission is primarily interested—which, we assume, is the interests and rights of interstate purchasers—would require that the contract be maintained in full force, lest those purchasers lose all the benefits they obtained when Sierra decided to turn down the Bureau's proposals in favor of Pacific's.

Valid contracts will not be abrogated just because they are a hard bargain, *Columbus Railway, Power & Light Co. v. Columbus*, 249 U. S. 397; *Colorado Power Co. v. Halderman*, 295 Fed. 178, 194; and Pacific cannot escape its obligations under its contract with Sierra merely by invoking

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its status as a regulated utility // whose contracts are subject to change. *Oklahoma Gas & Electric Company v. Okla-*

homa Natural Gas Company, 85 Okla. 25; *Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co.,* 295 Fed. 895.

To permit a utility which has entered into a low rate contract of this kind in order to meet competition, to evade its obligation at any time that the threat of competition ceases to exist by merely showing that a higher rate is "reasonable" would, of course, render any such contract nugatory and valueless, for the contract would contain within its very terms the seeds of its own destruction at the will of one party. We believe that such a result would be against the public interest.

Surely it is in the public interest that the Nevada consumers served by Sierra should receive some benefit from the opportunities they had in 1947 and 1948 to obtain cheaper power from the Bureau of Reclamation. Surely also, it was the duty of Sierra's management to see to it that they obtained the greatest benefit possible from these opportunities. How could Sierra's management have intelligently dealt with that situation if it had been impossible for them to enter into any binding contract at a fixed rate? As we have seen, if it had not been believed that the contract offered by Pacific would be binding for its duration, Sierra's management would not have entered into it, nor would the Public Service Commission of Nevada have permitted it to do so. As a result, Sierra would have been forced to accept the Bureau's proposal with its many unfavorable features. This would have involved the immediate development of additional plants by Sierra to tide over the expected shortages until the Bureau's lines could be completed, as well as expensive standby arrangements until the Bureau's lines were adequate to meet all possible needs. While the net result would no doubt have been cheaper to

Nevada's consumers than the con- // tract rates offered by Pacific prior to October 25, 1947, it would probably have been more expensive and certainly less satisfactory than the contract finally offered by Pacific on that date. Surely it is in the public interest that the management of a utility confronted with such problems as those which Sierra was attempting to solve at that time, should be in a position to weigh the relative merits of such competing offers and accept the one which appears to be most desirable, with confidence that it could not be repudiated at any time by a mere showing that the rates were low.

Conclusion

When Sierra was exploring the possibilities of obtaining cheaper power from the Bureau of Reclamation and was consistently refusing to accept Pacific's offer of a new 15-year contract at existing rates with a fuel escalator clause, Pacific finally decided to offer Sierra its so-called P-31 rate. Pacific's officers had publicly stated under oath that the purpose of this rate was to meet competition and hold business, by assuring the purchaser that he would have the benefit of the low rate at least for the duration of the contract (Exh. 10, p. 76). It is indisputable on this record that it was assumed by everyone at the time this contract was negotiated, executed, and approved by the California Commission that the low rate would be binding at least for 15 years.

After the threat of competition from the Bureau or from other sources had ceased to be a serious danger, Pacific synically determined to repudiate its solemn agreement. In order to accomplish this purpose it has put a witness on the stand before this Commission to blandly contradict under oath everything that Pacific's own officials had sworn to at the time the contract was under consideration, and asks that the rates be increased simply because they are low.

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We can think of // no better characterization for such action than that made by Pacific's own attorney at a time when the threat of competition was still present: "[A]nybody would agree" that it was "double dealing repudiation" to enter into such a contract and then appear before the Commission and ask "that the rates be increased" (Exh. 16, p. 1310).

We think we have demonstrated beyond question that Pacific's present efforts to repudiate its obligations are based upon an erroneous concept of the law; we think we have also demonstrated that, regardless of the legal questions involved, it would be against the public interest to permit Pacific to repudiate its obligations to Sierra at this time. In closing, we respectfully suggest also that it would be a salutary thing for this Commission to let it be known throughout the utility industry that it will not permit its facilities and procedures to be utilized in aid of such a scheme.

Wherefore, Sierra respectfully submits that the Commission should reject Pacific's proposed Supplement No. 1 to Pacific's Rate Schedule FPC No. 3.

There are submitted as an Appendix hereto proposed Findings of Fact and Conclusions of Law.

Dated: June 26, 1953.

Respectfully submitted,

Winthrop, Stimson, Putnam & Roberts,
Attorneys for Intervenor, Sierra Pacific Power Company,
Office and P. O. Address,
40 Wall Street,
New York 5, N. Y.

William C. Chanler,
Elliott E. Vose,
Gerard Thomas
Of Counsel.

Appendix

Proposed Findings of Fact

1. Pacific Gas and Electric Company (herein called "Pacific") is a corporation organized and existing under the laws of the State of California and is engaged in the sale for resale of electric energy in interstate commerce.

2. Sierra Pacific Power Company (herein called "Sierra") is a corporation organized and existing under the laws of the State of Maine with its principal place of business in the State of Nevada. Sierra engages in the business of selling electric energy to customers in Nevada and eastern California.

3. Pursuant to a contract entered into between Pacific and Sierra on March 4, 1948, Sierra purchases from Pacific, at rates set forth in said contract, a substantial portion of the electric energy which it sells to its customers.

4. Pacific has filed with this Commission its proposed Supplement No. 1 to said Rate Schedule FPC No. 3 by which it seeks to increase the rates and charges to Sierra, but requesting that the balance of said contract remain unchanged.

5. The contract of March 4, 1948 between Pacific and Sierra was authorized and approved by the Public Utilities Commission of the State of California by an order of April 27, 1948, after a public hearing held on April 15, 1948, and this contract was filed with the Federal Power Commission and constitutes Pacific's Rate Schedule FPC No. 3.

6. In the years 1945 and 1946 it became apparent that the rapidly increasing demands on Sierra would require

Sierra to obtain additional capacity in order // to serve its load in the future and during the years 1945 through 1947 Sierra sought sources from which it might obtain the additional capacity which it would require.

7. In 1946 Sierra advised Pacific of its need for additional power and that it would require lower rates for such power.

8. During the years 1946 and 1947 Sierra was subjected to vigorous pressure from officials, civic groups and the public in Nevada urging that Sierra make arrangements to obtain "cheap" government power from Federal power projects, such as Shasta Dam or Boulder Dam, and Sierra was criticized for the high rates which it was paying Pacific for electric energy under the then existing contract between the two campanies.

9. During the years 1946 and 1947 Sierra conducted negotiation with the Bureau of Reclamation and with the Colorado River Commission of Nevada looking towards the accomplishment of a plan whereby government power could be supplied to Sierra through the Colorado River Commission.

10. On or about January 22, 1947 Pacific proposed that it would supply Sierra's requirements for additional capacity by erecting a 110 k.v. transmission line and that in return for this investment it would require a 15-year contract at the same rates which were then in force between the two companies, together with the addition of a fuel escalator clause.

11. Sierra refused to negotiate wth Pacific on the basis of Pacific's proposal of January 22, 1947 and advised Pacific that it was under heavy pressure to arrange for the purchase of power from the Federal government and could

not negotiate with Pacific until the availability of such power had become clarified.

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12. On October 4, 1947 Sierra rejected Pacific's offer to supply its additional needs at the then existing rates, together with a fuel escalator clause, and advised Pacific that it could continue to negotiate no longer.

13. On or about October 21, 1947 Sierra's negotiations with the Bureau and with the Colorado River Commission had progressed to the point where the Bureau submitted a proposed form of contract to the Colorado River Commission for supplying government power for use in Nevada.

14. Thereafter on October 25, 1947 Pacific, for the first time, offered to supply Sierra's additional requirements at a rate equivalent to its then filed P-31 rate, which was lower than the rate in the then existing contract between Sierra and Pacific, and, in addition, offered to give up the inclusion of a fuel escalator clause in the proposed contract.

15. The P-31 rate was established by Pacific in 1945 in order to meet the threat of competition from government-owned power facilities and in order to enable Pacific to retain the business of its customers who were offered government-owned power at more favorable rates than those then available from Pacific. This Schedule P-31 was understood and intended to be less than fully compensatory to Pacific and was put in effect with the understanding that Pacific's other customers would not be compelled to bear the burden of any loss sustained by Pacific as a result of the low rates, which loss, if any, would be borne by the stockholders of Pacific.

16. Officials of Pacific, in testifying before the Railroad Commission of the State of California in 1945 in support of Schedule P-31, represented that one of the advantages

of said rate to Pacific's customers was the // assurance of service at the low rate for the period of the contract.

17. The rates established by Pacific in its contract of March 4, 1948 with Sierra are the equivalent of Pacific's P-31 Rate Schedule and were less than fully compensatory when offered to Sierra and were offered and made available to Sierra in order to meet the competition of the Bureau of Reclamation and in order to retain Sierra's business for Pacific.

18. The rates presently in effect in the contract of March 4, 1948 presently return to Pacific 1.2% on an undepreciated rate base and 0.7% on a depreciated rate base when computed by Pacific's methods and when computed in accordance with Federal Power Commission methods these presently existing rates return 2.6% to Pacific on a depreciated rate base.

19. Both Pacific and Sierra have performed their obligations under the contract of March 4, 1948 and Sierra has invested approximately one million dollars in facilities for the performance of its obligations thereunder.

20. Since the date on which the contract was entered into Sierra's position has changed, partly as a result of the acts of Pacific, so that Sierra is no longer in a position to obtain power at lower rates from the Bureau of Reclamation or other sources which were considered at the time the contract was made.

Proposed Conclusions of Law

1. The contract between Pacific and Sierra entered into on March 4, 1948 and constituting Pacific's Rate Schedule

FPC No. 3 is a valid and binding contract and the rates and charges set forth in said contract for the sale of electric power by Pacific to Sierra are valid and legal rates and are an integral part of said contract.

2. The said contract and the rates and charges therein set forth cannot be changed by the filing of proposed new rates without a showing that said contract, under all of its terms and conditions, and in the light of the circumstances under which it was made, is an unreasonable contract because it is injurious to the public interest.

3. The said contract is a just and reasonable contract in the light of the circumstances and conditions under which it was made and is not against the public interest.

4. The rates and charges contained in said contract are just and reasonable in the light of the circumstances and conditions under which they were offered to Sierra by Pacific and such rates and charges are not against the public interest.

5. Pacific has not shown that said contract and the rates and charges set forth therein are unreasonable and injurious to the public interest.

6. In the light of the circumstances and conditions under which the contract was entered into and the reasons and purposes for which the rates and charges therein set forth were offered by Pacific to Sierra and in view of the fact that the said rates are not injurious to the public interest, it would be unjust, unreasonable and inequitable to allow Pacific's proposed Supplement No. 1 to its Rate Schedule FPC No. 3 to go into effect.

* * * * * * *

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UNITED STATES OF AMERICA

Before the

FEDERAL POWER COMMISSION

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY	Docket No. E-6482

Brief for Commission's Staff and Requested Findings

[2364]

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[Title of Commission and Cause omitted]

BRIEF OF COMMISSION'S STAFF COUNSEL

Statement of The Case

This is a proceeding to determine the lawfulness of a proposed rate increase by the Pacific Gas and Electric Company (P.G.&E.) for supplying a large part of the power requirements of the Sierra Pacific Power Company (Sierra).

On February 2, 1953 (Tr. 6), P.G.&E. submitted for filing pursuant to Section 205(d) of the Federal Power Act a proposed supplemental rate schedule tentatively designated as Supplement No. 1 to its Rate Schedule FPC No. 3 (Ex. 1). The new schedule would increase its charges for service rendered to Sierra by an estimated $419,400 (28.4%) for the year 1953 (Tr. 6). The old Rate Schedule FPC No. 3 is an agreement entered into March 4, 1948, which is to continue until July 1965, or for a period of 15 years after the in-service date of an additional 110-kv line which may be constructed pursuant to the agreement (Ex. 1).

Under that rate schedule Sierra now purchases approximately 40,000 kw of firm power and 4,000 kw of stand-by power from P.G.&E. (Tr. 6). Billing for the firm power is in accordance with a rate which is similar to P.G.&E.'s schedule "P-31" (Tr. 230-237) formerly on file with the California Commission as a rate generally available for

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service in intrastate commerce to // "entire requirements" purchasers for resale (Ex. 20; Tr. 540-541, 565). The stand-by service is billed at the rate of $30,000 per year (Tr. 218-219). P.G.&E., by the proposed supplement, seeks to change this existing arrangement by substituting higher demand and energy rates, similar to its schedule "R" (Tr. 212) now on file with the California Commission as a rate generally available for service in intrastate commerce to "entire requirements" purchasers for resale (Ex. 8, p. 4; Tr. 229-230). It would leave all other terms of the 1948 agreement unaltered, including the 15-year term provisions, the minimum bill provision, and a provision (sometimes referred to as the "exclusionary provisions") which prevents Sierra from obtaining any of its energy supply from any other new source except under "minor standby and minor exchange agreements" (Ex. 5, p. 2, par. 1).

The Public Utilities Commission of California, the Public Service Commission of Nevada, and Sierra were invited to comment upon the proposed increase. The California Commission stated that Pacific had filed a similar application with it and refused comment at that time. The Nevada Commission by telegram dated March 2, 1953 stated that because of the present contractual arrangement between P.G.&E. and Sierra it opposed any such increase in rates and requested a public hearing in the matter before any increase is granted. Sierra by letter dated March 7, 1953, indicated that it regarded the rate contained in the proposed supplement as unreasonable and unjust and that, notwithstanding

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the fact that the rate contained in the present // agreement might fail to provide as high a rate of return as the Commission might otherwise find to be reasonable, it is just and reasonable and not unduly preferential or discriminatory because of other considerations for the rendering of service, existing at the time the present agreement was entered into (Tr. 7).

On March 13, 1953, this Commission suspended the rate increase embodied in the proposed supplement and ordered that a hearing be held April 6, 1953, concerning the lawfulness of the rates or charges proposed therein. Its order referred to the foregoing facts and found:

(1) The increased rates or charges proposed by Supplement No. 1 to Pacific's Rate Schedule FPC No. 3 may be unjust, unreasonable, unduly discriminatory or preferential.

(2) It is necessary, desirable and in the public interest that the Commission enter upon a hearing concerning the lawfulness of the rates or charges proposed by Supplement No. 1 to Rate Schedule FPC No. 3 and that said proposed rates or charges be suspended pending such hearing and decision thereon.

Sierra by two petitions filed in the above-entitled proceeding on March 23 and one on March 30, 1953, requested among other things: (1) that it be granted permission to intervene in the instant proceeding; (2) that this Commission modify and amend its suspension order issued March 13, 1953, so as to reject the proposed supplement as improperly filed by P.G.&E. under Section 205 of the Act and (3) that if rejection be denied, the Commission direct that the hearing set by said order be limited solely to its contentions that the proposed supplement may not lawfully

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be filed under Section 205 of the Act. // In support of (2) Sierra argued that under the 1948 agreement between the parties, Sierra possessed contract rights which could not be changed under the rate filing and suspension provisions of Section 205 of the Act but only under the rate complaint and investigation provisions of Section 206.

The Commission's Staff Counsel on April 3, 1953, responded, pointing out *inter alia,* that the Commission has consistently rejected any such restrictive interpretation of the statutory rate filing and suspension provisions of Section 205 of the Federal Power Act and the corresponding Section 4 of the Natural Gas Act. To this response Sierra, on April 17, 1953, filed a reply reiterating substantially the same requests.

The Commission by order issued April 17, 1953, granted Sierra's request for permission to intervene, but denied its other requests in all respects "* * * without prejudice to the right of Sierra to maintain its contentions as to the effect of the filing of Supplement No. 1 under Section 205(d) of the Act, and as to the Commission's authority in this proceeding."

On April 6, 1953, the hearing set by this Commission's order issued March 13, 1953, was continued by agreement of the parties until April 21, 1953, at which time all the parties were afforded an opportunity to present evidence in support of their respective positions. The hearing was concluded on May 1, 1953.

On May 18, 1953, Sierra filed a petition seeking rehearing of the Commission's order of April 17, 1953, insofar as that

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order // denied requests made by Sierra, and oral argument at such rehearing. By order issued June 17, 1953, the Commission dismissed Sierra's petition for rehearing after finding:

> The petition for rehearing filed by Sierra on May 18, 1953, must be dismissed as being improperly filed because the matters therein sought to be reviewed involve only an interlocutory and procedural ruling and do not involve a final decision by this Commission of the only substantive issue as to which a rehearing is sought.

The intermediate rate decision procedure was omitted by the Commission's order issued June 17, 1953.

There is presently pending and undecided by the Commission a motion by Staff Counsel filed June 18, 1953 requesting reopening of the record to receive certain exhibits. The time within which responses of the other parties to this motion may be received will expire June 28, 1953.

The Sale

The sale here involved is made by delivery of energy by P.G.&E. over three transmission lines at Summit, a point near the famous Donner Pass. Two of the transmission lines are 60 kv, the other 110 kv. P.G.&E.'s lines extend a distance of approximately 27 miles to the delivery point at Summit from its Drum station and Spaulding hydroelectric plant, on its interconnected system by which it serves a large part of the State of California (Ex. 2, pp. 1-3; Tr. 48-49, 51-52, 56, 62).

Sierra's lines extend a distance of approximately 80 miles from Summit to its interconnected system by which it serves

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customers in // California (Ex. 2, pp. 2, 9) in the general vicinity of Lake Tahoe, and over a large area in the State of Nevada. A major part[1] of Sierra's load is located in northern and northwestern Nevada, the remainder in eastern California (Tr. 57, 623). With an immaterial exception (Tr. 49, 121) the lines from Drum and Spaulding to California substation are used exclusively for this sale. The energy sold is metered by meters located at Summit on the 60-kv lines (Tr. 51, Ex. 2, p. 3, Tr. 56) and at Sierra's "California" substation on the 110-kv line, adjustment being made for line losses from Summit (Tr. 52, Tr. 56).

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[1] Approximately 85% of its customers, 89.7% of kwhrs sold, and 87.4% of revenues are derived from Nevada 1951 Annual Report (Form FPC No. 1) of Sierra Pacific Power Company, p. 74, 74-A.

Questions Presented

There seems to be no ground to question that the increased rate proposed by P.G.&E. will provide less than P.G.&E.'s cost of serving Sierra, including in such costs return on an allocated part of P.G.&E.'s net investment at a rate of return which would be reasonable for its electric utility operations as a whole.

In response to staff requests, P.G.&E. presented as Exhibit 19 a development of cost of service to Sierra under present and proposed rates, for the test year 1952.[2] The

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[2] Exhibit 19 was requested by Staff Counsel when in the course of the hearing it became apparent that P.G.&E.'s development of cost of service and rate of return for service rendered to Sierra (Exhibits 3 and 4) was not in all respects in accord with the applicable precedents of this Commission or supported by sufficient showings. Chief among such inadequacies were (1) Including in costs of service to Sierra all of the costs associated with special facilities for the sale to Sierra while failing to exclude costs associated with similar special facilities for serving certain other customers or areas in system costs also allocated to Sierra (Tr. 92, 95, 106-107). (2) Failure to use a net investment rate base, computed by deducting from original cost of plant the accrued depreciation reserve requirement, and adding working capital, and failure to treat the total annual depreciation charge (i.e., both the "annuity" and "interest" components as operating expenses (Tr. 122, *et seq;* compare Exhibit 4, p. 5, with Exhibit 19, p. 2). (3) Inclusion of an amount for amortization of amounts in Account 100.5 as an operating expense (Tr. 174, 179-180). (4) Allocation of Social Security Taxes, Administrative and General Expense and Pensions on the basis of maintenance and operating expense (Tr. 511-516) instead of on the basis of labor costs alone. (5) Use of accrued depreciation as of the end of 1951, instead of the average for the test year 1952, whereas original cost of plant was taken as the average for 1952 (Tr. 162-165, 752, 753). (6) Failure to include working capital requirements other than materials and supplies (Tr. 764). (7) Failure to deduct from Working Capital requirements insofar as included, 75% of its Federal income tax accruals, which amount is continuously available (Tr. 1075-1076) to it for

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parties stipulated that if called, // duly qualified Commis-

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any purpose (Tr. 761). (8) Allocation of Common Utility Plant to the Electric Department on a revenue basis instead of on an investment basis (Tr. 765-767). The foregoing deficiencies were corrected by incorporating adjustments in Exhibit 19 where appropriate or by explanation upon the record as follows:

(1) Exhibit 19 treats the special facilities used solely to serve Sierra, like the other special facilities, as part of P.G.&E.'s total integrated plant (Tr. 860-861), to be allocated to Sierra, which treatment P.G.&E.'s witness thought reasonable (Tr. 813). (2) A net investment rate base is used, deducting the depreciation reserve per books and adding an allowance for working capital. The Book depreciation reserve, although accumulated on a sinking fund basis which would cause it to be expected to be lower than if accumulated on a straight line basis (Tr. 129) has been computed by the use of service lives substantially shorter than those which would normally be used for the straight line method (Tr. 148-149). The total annual depreciation charge is treated as an operating expense. (3) P.G.&E.'s counsel offered to stipulate that the amount contained in Account 100.5 which was placed in operating expenses would be withdrawn (Tr. 184). Staff Counsel and Sierra's counsel agreed to this stipulation (Tr. 185). Exhibit 19 was prepared in accordance with this agreement. (4) P.G.&E.'s witness agreed with Staff Counsel that labor cost would be a better basis than maintenance and operating expense on which to allocate Social Security Taxes, administrative and general expenses and pensions (Tr. 512). However, because of the relative difficulty of separating labor costs out of maintenance and operating expenses (Tr. 771-772) and the probability that if that were done no significant change in allocation would result (Tr. 512), the Staff did not feel the matter warranted further attention. (5) Exhibit 19 uses average depreciation for the test year 1952 as well as average plant original cost for that year (Tr. 753-754). (6) P.G.&E.'s witness stated (Tr. 1076-1077) that he thought the determination that 75% of P.G.&E.'s income tax accrual was continuously available to it, was reasonable. Exhibit 19 embodies such a deduction from working capital requirements (Tr. 762-763). (7) Exhibit 19 includes an allowance for working capital computed in accordance with the methods heretofore employed in FPC cases (Tr. 856). (8) P.G.&E.'s witness testified (Tr. 767-768) that an allocation of common utility plant to the electric department on a space-use basis made by the California Public Utilities Commission was within less than one percent of an allocation made on a revenue basis and that he thought this would approximate an investment basis. In view of this Staff Counsel did not think the matter merited any further consideration.

sion staff experts would testify that, assuming the correctness of the data reflected in Exhibit 19 in the manner explained by [P.G.&E.'s witness] Mr. Roberts and assuming

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further that the // same rate of return which is reasonable for the electric department of Pacific Gas and Electric Company on a net investment rate base, as heretofore stipulated [Tr. 675], is reasonable for that company's sale to Sierra Pacific Power Company on a corresponding base, upon the facts disclosed in the record and for the purposes of this proceeding the method employed in Exhibit 19 to develop cost of service and rate of return as of 1952,[3] in their opin-

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[3] Adjustments should be made to the results shown for the test year 1952 due to the fact that 1952 was not representative, but such adjustments would not alter the net results sufficiently to affect the conclusions to be drawn from Exhibit 19 in this proceeding. Some of those adjustments would lower the cost of service shown for the test year 1952, like that for tax reductions during the next five years due to the use of accelerated amortization in computation of income taxes under certificates which P.G.&E. has already obtained (Tr. 786, 1070) and the absence of any commitment upon the part of P.G.&E. to make normal adjustments during subsequent years when taxes will be higher (Tr. 796). The record shows the importance of such a commitment in view of the fact that similar tax reductions during World War II were not reflected in their current rates, while subsequently increased taxes are included in the showing made in support of this present proposed rate increase (Tr. 799-804, 1078-1081). The tax reduction each year for the years 1953-1957 will be $5,602,026 (Tr. 1072-1074) as compared to allowances for taxes in Exhibit 19 before allocation to cost of service to Sierra of $1,256,482 for state and $15,114,164 for federal income taxes. Other adjustments increasing costs in amounts not disclosed by the record might be appropriate on account of wage increases effective during 1952 not reflected in that year's expenses on a full twelve month basis; increased fuel costs due to the fact 1952 was a year of above-average rainfall and due to increased cost of fuel oil and natural gas under rate increases since 1952 (Tr. 840-841, 873-878, 1085-1088).

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ion, is reasonable and proper and in // accord with applicable Commission precedents, this stipulation being without prejudice to the right of Sierra Pacific to contend that such facts are not relevant or material to any issue in this proceeding. (Tr. 1023).

Exhibit 19 shows that the present demand and energy rate provided a return of 2.60%, while the proposed rate would have provided a return of 4.75%. These are to be compared with a fair rate of return of 5½%, inasmuch as the parties stipulated that:

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> for the purposes of this proceeding only the facts would support a Commission finding that five-½ percent is a reasonable rate of return for Pacific Gas and Electric Company's electric department on a net investment rate base, without prejudice to the right of Sierra Pacific Power Company to contend that such facts are not relevant or material to any issue in this proceeding. (Tr. 675).

The only issues which appear to call for discussion in this brief are: (I) whether the rate fixed in the 1948 contract between P.G.&E. and Sierra filed with the Commission as a rate schedule is subject to change without Sierra's consent, and over its objection, under Section 205, by P.G.&E.'s filing of an increase, as a supplement to that rate schedule, or by order of this Commission, or both; (II) if so, whether the fact that the proposed rate is less than the cost of service is in itself sufficient to support or require a Commission determination that it is just, reasonable, and not unduly discriminatory or preferential, and hence is lawful.

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Argument

I

The Contract Rate Is Subject to Change Under Section 205

Sierra argues from the fact that in Section 206 the authority conferred upon the Commission to fix a rate is supplemented by an express power to "fix" "any * * * contract * * * affecting such rate," that the different language of Section 205 does not authorize an alteration of a contract to be effectuated by the act of a public utility filing a new rate schedule or by an order of the Commission. From this it advances to the further argument that the authority conferred by Section 205 to change rates should be impliedly limited to such rates (if any) as are not embodied in contracts like Sierra's 1948 contract with P.G.&E.; otherwise a change in rate would necessarily change the contract.

But this tenuous argument, which would largely nullify the effectiveness of Commission rate regulation and the "filed rate" procedure, is based on a clear misreading of the Act and ignores its legislative hisory and administrative interpretation.

Sierra further argues that the Act should be construed as not authorizing alteration of rates fixed by contract, in order to avoid unconstitutionality. But this argument is plainly erroneous under well established principles that private contracts must yield to regulation in the public interest as embodied in the usual rate filing procedures, such as are embodied in the Federal Power Act.

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Finally, Sierra argues, in an effort to avoid the decisions which clearly show the error of some of its other contentions, that the rate fixed in its 1948 contract cannot be altered under the Federal Power Act because that contract by its terms was subject to approval of the California Commission and such approval was, in fact, obtained. No authority is cited for this novel proposition that a rate cannot be changed because it has at an earlier date received regulatory commission approval or the even more novel proposition that that would be true where the earlier "approval" was by another commission which could not exercise a jurisdiction conflicting with the regulation provided by the Federal Power Act.

The errors in these contentions will be briefly discussed.

A. Sierra's argument would nullify the efficacy of the statutory method of rate regulation.

The essence of the scheme of rate regulation adopted in the Federal Power Act is that the rate filed by the selling utility (or the Commission fixed rate where the Commission has found that the filed rate does not meet the statutory standards) is the legal rate—i.e., the only rate that can be enforced in the courts. *Northwestern P. S. Co. v. Montana-Dakota U. Co.,* 181 F.2d 19 (CA 8), affirmed 341 U.S. 246. In that case the Court of Appeals said (181 F.2d at p. 22):

> The plan or scheme of the Federal Power Act is analogous to that of the Interstate Commerce Act, * * * and decisions under the latter Act should be controlling here. * * * The rates filed and approved by the Commission are the lawful rates until changed in the way provided by the Act (citing numerous cases beginning with the *Abilene* case). * * * So long as the filed rate is not changed in the manner provided by the Act it is to be treated as though it were a statute, binding upon the seller and the purchaser alike. * * *

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Upon certiorari the Supreme Court took the same view of the Act (341 U.S. at p. 251):

> [Petitioner] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

See, also, *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 439 (1907); *Union Dry Goods Co. v. Georgia Public Service Corporation,* 248 U.S. 372, 375 (1919); *United States v. Jones,* 336 U.S. 641, 671 (1949); *Colorado Interstate Gas Co. v. Federal Power Commission,* 142 F.2d 943, 953 (C. A. 10, 1944), affirmed, 324 U.S. 581; *Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, 162 F.2d 388, 390 (C. A. 5, 1947), cert. den., 332 U.S. 770; *cf., Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 173 F.2d 784, 788-789 (C. A. 6, 1949).

The procedure for regulating rates thus provided by the Act places responsibility upon the selling utility to propose rates and contracts, and from time to time to propose changes in rates and contracts, to comply with the statutory requirements that its rates be just and reasonable (Section 205(a)) and not unduly preferential or discriminatory (Section 205(b)). See *Gibbs v. Baltimore Gas Co.,* 130 U.S. 396, 410-411; *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 458-459; *Pennsylvania W. & P. Co. v. Consolidated G. E. L. & P. Co.,* 184 F.2d 552, 567 (C. A. 4), certiorari denied 340 U.S. 906.

As the Court said in the *Gibbs* case, *supra:*

> It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and

> by agreement compel itself to make public accommodation or convenience subservient to its private interests.

The importance of the duty Petitioner was under to take the initiative in proposing any new rate necessary to eliminate the discrimination was emphasized by the Fourth Circuit in the *Pennsylvania W. & P. Co.* case, *supra*:

> One of the most important duties of a public utility, inherent in its franchise to serve the public, is the duty to take the initiative in proposing reasonable rates and rendering adequate services, taking into account changing conditions; and the utility is not relieved from this duty because its activities are subject to governmental regulation, for a regulatory commission is not clothed with the responsibility or qualified to manage the utility's business.

Also placed upon the selling utility by Section 205(e) is the burden of justifying any new rate or contract proposed by it which is questioned by the Commission and if the Commission finds that it has not been shown to satisfy the statutory standards, the Commission may by its order enforce those standards.

No exception is made by the Act to the responsibilty of the selling utility to propose and the Commission to enforce the statutory standards of lawfulness. To permit a selling utility by contract to escape its responsibility or bar the Commission from discharging its duty as Sierra would have it would thwart and defeat the statutory scheme.

B. The terms of Section 205 authorize alteration of filed rates even though embodied in contracts.

If there had been no mention in either Section 205 or Section 206 of any authority with respect to alteration of "contracts," and both Sections had spoken solely in terms of "rates and charges," there would have been no color of basis for Sierra's argument. For it is well settled law, as will appear later, that a simple legislative provision for

the alteration of utility rates can not be defeated by private contracts. Sierra's argument then, is that because Section 206(a) confers additional powers to fix "any rule, regulation, practice, or *contract* affecting such rate," that the grant of that additional authority somehow withdraws or subtracts from the authority which would otherwise be conferred by Section 205. This is an obvious *non sequitur.*

Moreover, Sierra further errs, because Section 205, itself, expressly authorizes alteration of contracts. Thus Section 205(c) provides for the filing of "schedules showing all rates and charges * * * together with all *contracts* which in any manner affect or relate to such rates, (and) charges * * * ". And Section 205(d) authorizes changes in any *"contract"* relating to a rate to be effectuated by filing a new schedule, in the same clause by which it authorizes changes in the rate.[4]

Thus by the direct express terms of Section 205(c) P.G.&E.'s 1948 contract was required to be filed in order to be a legally enforceable obligation, and by Section 205(d) a change in that contract could be made, and could only be made, by giving the prescribed notice, i.e., by posting and filing new schedules showing the change.[5]

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[4] "(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect.

The Commission's power under Section 205(e) to deal with changes sought to be effectuated under Section 205(d) is made correspondingly broad. For Section 205(e) provides:

> * * * after full hearings, either completed before or after the rate * * * goes into effect, the Commission may make such orders with reference thereto *as would be proper in a proceeding initiated after it had become effective.*

What those orders are is defined by Section 206(a), i.e., to fix the rate *or contract* to be thereafter observed and in force if the Commission finds the rate or contract as proposed unjust, unreasonable, or unduly discriminatory or preferential. If it does not so find, the Commission fixes no new rate or contract and the proposed rate and contract, filed in accordance with the terms of Section 205(d), become effective as of the termination of the Commission's suspension, under the authority of Section 205(d).

The plain terms of the Act thus dispose of Sierra's contention that a contract rate cannot be altered without a finding that the former contract was unreasonable. For by Section 205(d) all regulated rates of a public utility and contracts affecting or relating to such rates, are made subject to alteration *by the public utility,* by posting and filing the new rate and contract in the prescribed manner. But this power of alteration is not absolute. Section 205(e) makes such alteration subject to five-month suspension and puts upon the public utility the burden of justifying the new rate and contract. If that *new rate or contract* is found unlawful, the Commission may by order fix the just, reasonable and not unduly discriminatory or preferential rate and contract to be thereafter observed and in force.

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[5] "Schedule" is expressly defined by the Commission's rules to include and mean any contract which specifies or affects the rate. § 35.1. The Act expressly authorizes the Commission to define technical terms used in the Act (Section 309) as well as to prescribe rules and regulations governing filings under Sections 205, 205(c) and 309.

C. The legislative history and administrative interpretation of Section 205 show contract rates are not exempt from alteration.

The provisions of Sections 205 and 206 are similar to those of the Commerce Act (49 U.S.C. §§ 1(5), 6(1), 6(5), 6(7), 6(9), 13, 14, 15(1), 15(3), and 15(7). The legislative history of the Power Act shows that generally it was patterned on that Act, the Communications Act (47 U.S.C. §§ 151, *et seq.*, see particularly §§ 201-205), and, in places, on state regulatory statutes. Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 5423 (74th Cong., 1st sess.) pp. 392, 393, 2170. This, and the complete absence of anything showing an intention to depart from the usual rate filing provisions as construed by the courts, is important. For it shows that this Commission's powers in a suspension proceeding under Section 205(e) should, like I.C.C.'s powers under its corresponding Section 15(7), be construed as broadly as its powers in a rate investigation proceeding under Section 206(a) which corresponds to I.C.C.'s Section 15(1). *Ayrshire Collieries Corp. v. United States,* 335 U.S. 573, holding I.C.C. powers under its Section 15(7) to be as broad as its powers under Section 15(1) is therefore significant, notwithstanding the fact that no contract right to a rate was asserted there, because of the principle it adopts of interpreting those two sections as intended to confer equally broad powers.

It is noteworthy that the Commission's General Solicitor, Dozier A. De Vane, in testifying on the substantially identical provisions of a predecessor bill to the bill which ultimately become the Natural Gas Act (Hearings House Subcommittee of Committee on Interstate and Foreign Commerce (74th Cong., 2d sess.) on H.R. 11662, pp. 28-29)

manifested his // understanding that under provisions like those of Sections 205(c) and 205(d) the selling utility fixes its rates and changes them by complying with the prescribed filing requirements, subject to the Commission's over-riding regulatory powers, without mentioning private contract rights:

> Mr. Lea. Mr. DeVane, under what conditions would rates be put into effect? That is, what would be the procedure?
>
> Mr. DeVane. In the beginning?
>
> Mr. Lea. Yes.
>
> Mr. DeVane. The companies will simply file their schedules.
>
> Mr. Lea. And those schedules would prevail unless the Commission saw fit to, after a hearing and notice, establish a rate?
>
> Mr. DeVane. Yes, sir; those rates would prevail. The rates that the company makes effective at the date of filing are the rates that will continue in effect until they are changed either by the company, as provided in section 4, or by the Commission after hearing.

* * * * * * *

> Mr. Cooper. And anyone who wants to file a complaint goes to the Commission; it that right?
>
> Mr. DeVane. That is correct; and they can change their rates, Mr. Cooper, by filing new schedules under section 4(d). After they have filed them with the Commission and announced those new rates, the Commission has the power to suspend and investigate, and the suspending power extends for a period of 5 months.

Consistenly with the views thus expressed by its General Solicitor the Commission has repeatedly denied such a restrictive construction of the statutory rate filing and suspension provisions as argued for by Sierra, both under Section 205 of the Power Act (*City of Los Angeles v. Nevada California E. Corp.*, 2 FPC 104, 108-109), and the corresponding Section 4 of the Natural Gas Act (see, e.g., *Panhandle Eastern Pipe Line Co.*, 9 FPC 443, 444-446;

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City of Detroit v. Panhandle Eastern Pipe Line // Co., 6 FPC 1044, Docket Nos. G-200, 207, Order Allowing Supplemental Rate Schedules to Take Effect, issued November 26, 1947, petition to review dismissed, 170 F.2d 150 (CA 8); see also the discussion of the problem in the Commission's brief in *Michigan Consolidated Gas Company v. F.P.C.*, 181 F.2d 796, C.A.D.C. No. 10126 (December 1949), pp. 48-51, particularly note 58.

In the *Los Angeles* case *supra* the Commission had initiated a proceeding under Section 206(a) to determine the lawfulness of a rate which Nevada-California Electric Corporation charged the municipality of Los Angeles for transmission of energy. The corporation was a "public utility" generally subject to Commission regulation; the municipality exempt, under Section 201(f). The corporation claimed that its contract rates with the municipality could not be altered by the Commission because of the municipality's exemption, saying that the municipality "would have the right to file a complaint with the Commission claiming that the rates are unreasonably high, whereas the defendant would not have the correlative right to file with the Commission a complaint against the city * * * claiming that the rates are unreasonably low." The Commission rejected the contention on the ground that the corporation could always protect itself by filing a rate increase under Section 205(d) (2 F.P.C. at p. 109):

> Granting that the Commission is without authority to entertain such a complaint filed by the company against the city * * *, no injustice or hardship is thereby imposed upon the company. Under section 205(d) of the Act, public utilities may file with the Commission proposed changes in their filed rates and charges. This provision appears to negative defendant's contention and to afford adequate protection to it.

Sierra's attempt to label this "dictum" (Reply filed

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4/17/53, p. 9) // ignores the fact that the Commission's interpretation of the scope of Section 205(d) was an essential part of the reasoning by which the Commission reached its conclusion, and hence not dictum.

The *Panhandle* case, *supra,* reported at 9 F.P.C. 443, was a suspension proceeding under Section 4(e) of the Natural Gas Act (8 F.P.C. 1339). There the Commission had under consideration an application by customers of Panhandle for rehearing of an order allocating the gas to be supplied by Panhandle among its customers in a manner which differed from their contract entitlements. It was contended that the Commission lacked authority under Sections 4 and

5 of that Act to "change the terms or conditions of Panhandle's * * * contracts with customers" (9 F.P.C. at p. 444). The Commission overruled that contention, citing among others its prior decision in *City of Detroit v. Panhandle Eastern Pipe Line Co.,* 6 F.P.C. 196, 204, in which it had relied on *Union Dry Goods Co. v. Georgia P. S. Corp.,* 248 U.S. 372, and *Producers Transp. Co. v. Railroad Commission,* 251 U.S. 228, and concluding (9 F.P.C. at p. 446):

> Section 4 of the Natural Gas Act, as well as section 5, provides an adequate legal basis for our order. See *Ayrshire Corp. v. United States,* 335 U.S. 573 (1949).

Sierra's only answer to our citation of this *Panhandle* case heretofore has been to say that the contracts there involved were "impossible of performance and therefore clearly against the public interest * * * If any one contract customer could enforce its contract rights, other consumers would be left without sufficient gas. To meet this emergency, the Commission exercised its undoubted power to override

contract rights in the light of their obvious detriment to the public welfare." (Sierra's Reply filed 4/17/53, p. 9)

But in thus admitting that in a Section 4 proceeding, contract rights may be overridden in the public interest, Sierra has conceded its case. For if the Commission has jurisdiction under Section 205(e) to order an alteration of a contract right in the public interest, the only question left is the propriety of the Commission's exercise of its power, not the existence of the power.

This was made even clearer if anything in the next *Panhandle* case cited *supra* (issued November 26, 1947). There the Commission by order allowed a surcharge to be filed and become effective without the 30-day delay otherwise prescribed by the statute. A petition for review of the Commission's order, objecting that it overrode contract rights and advancing arguments similar to those here advanced by Sierra, was subsequently dismissed by the Eighth Circuit and the surcharge was successfully collected by Panhandle.

D. Constitutional considerations do not require the interpretation of Section 205 urged by Sierra.

Sierra contends, citing *Wichita Railroad & Light Company v. Public Utilities Commission of the State of Kansas, et al.,* 260 U.S. 48 (1922), *Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co.,* 295 Fed. 895 (1924), that the rate increase embodied in Supplement No. 1 should be rejected as improperly filed under Section 205(d) of the Act, arguing that its contract rights could not constitutionally be changed under the rate filing and suspension

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provisions of Section 205 of the Act // even if, after hearing, the Commission found the new rates to be lawful, but only under the rate complaint and investigation provisions of Section 206 of the Act on a finding that the old contract failed to satisfy the statutory standard.

That such a proposition is wholly without merit is clearly evidenced by *Midland Realty Co. v. Kansas City Power & Light Co.,* 300 U.S. 109 (1936). The Court there was considering a decision of the Supreme Court of Missouri (338 Mo. 1141, 93 S.W. 2d 954) which had construed the State statute as we have shown Section 205 provides, i.e., as *allowing a utility to abrogate existing contract rates by the mere filing of a new schedule of rates,* and as authorizing the order which the state commission had later entered prescribing a schedule of rates, to have the same effect. This, it was contended, violated Art. 1, § 10 of the Constitution of the United States, declaring that "No State shall * * * pass any * * * law impairing the obligation of contracts," [and] § 1 of the Fourteenth Amendment.

The Court said (300 U.S. at p. 112):

> Defendant's contention is not that the State lacked power by appropriate action to establish and enforce just and reasonable rates but that, as against the constitutional provisions invoked, the action taken under the public service commission law was not sufficient to abrogate the contract rates * * *. There is here involved no question as to the validity of the rates prior to the passage of the statute. Without expression of opinion, we assume that then the parties were bound by the contract. But the State has power to annul and supersede rates previously established by contract between utilities and their customers. * * * and it [utility customer] here insists that the contracts could not be abrogated "without a proper hearing, finding and order of the Commission with respect thereto." It does not, and reasonably it could not, contend that immediate exertion by the legislature of the State's power to prescribe and enforce reasonable and non-discriminatory rates depends upon or is conditioned by specific adjudication in respect of existing contract rates. It is clear that, as against those specified in the contract here involved, the rates first filed by plaintiff [utility] and those promulgated by the Commission in accord-
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> [2392]
>
> ance with the statute have the same // force and effect as if directly prescribed by the legislature. * * * Plainly, enforcement of the rates in accordance with the Statute did not violate either the contract clause of the Constitution or the due process clause of the Fourteenth Amendment.

That Sierra's contentions here, like those of the contract customer in that case, really involve only a problem of statutory construction is clear for a reason similar to that given by the Court there[6] (300 U.S. at p. 113):

> These questions are to be decided upon the construction * * * put upon the statute. And that law is to be taken as if it declared that rates made in accordance with its provisions shall supersede all existing contract rates.

The sole point decided in the earlier *Wichita* case, *supra,* was that a state commission order, entered pursuant to statutory authority like that in Section 206(a), was invalid for want of a finding which the United States Supreme Court held to be required *under the applicable state statute as construed by the highest court of the state,* in that case, the Supreme Court of Kansas. (Later, in *Consolidated Flour Mills Co. v. Kansas Gas & Electric Co.,* 119 Kan. 47, 237 Pac. 1037, the Supreme Court of Kansas denied the accuracy of the United States Supreme Court's construction of the state law, holding that it did not require the recital of the finding which the United States Supreme [2393] Court deemed necessary in the *Wichita* case. // See resulting comments in Gellhorn, Administrative Law—Cases and Comments, p. 771, note; Timberg, Administrative Findings of Fact, 27 Wash. U. L. Q. 62, 74; *cf., Pacific States Box & Basket Co. v. White,* 296 U.S. 176, 186).

As we have already shown, the only finding required as a basis for the kind of order the Commission may enter under Section 205(e) is that specified in Section 206(a), namely, that the rate or contract incorporating the proposed changes is unjust, unreasonable or unduly discriminatory or preferential. Absent such a finding, that rate or contract becomes effective by the force of the provisions of Section 205(d), and the constitutionality of that result is plain from the language of the *Midland* case quoted above.

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[6] The Missouri Court, treating the problem as one of statutory construction, distinguished *Arkansas Natural Gas Co. v. Arkansas R. Comm.,* 261 U.S. 379, and the *Witchita* case as involving different statutory provisions.

Sierra's attempt to distinguish the later *Midland* case on the ground that the contract there involved had been entered into before the enactment of the regulatory statute is wholly lacking in significance—if anything, a contract like that here involved, entered into after the enactment of the regulatory statute and necessarily subject to its terms, would be, even more clearly than one entered into before the enactment of the Act, subject to alteration as provided in the Act.

The opinion of the United States District Court in *Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co.*, 295 Fed. 895 (D. C. R. I.), upon which Sierra also relies, was later nullified by the Supreme Court of Rhode Island in *Attleboro Steam & Electric Co. v. Public Utilities Com'n,* 46 R. I. 496, 129 Atl. 495, and by the United States Supreme Court in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83. **[2394]** Whatever its value now, that opinion merely // demonstrates that Court's view that the state statute there considered must be read as implying a necessity for findings, following the *Wichita* case.

Nor do we see how Sierra's contentions are supported by reliance upon *Arkansas Natural Gas Company v. Arkansas Railroad Commission,* 261 U.S. 379 (1922), *Columbus Rail-*

way, Power & Light Company v. Columbus, 249 U.S. 399 (1918), *Colorado Power Co. v. Halderman,* 295 Fed. 178 (1924), *Oklahoma Gas & Electric Co. v. Oklahoma Natural Gas Company,* 85 Okla. 25, 205 P. 768 (1921) and *In Re Smith Paper,* 88 PUR NS 38 (1951). For those cases must be distinguished from the instant proceeding.

The *Arkansas* case, which was distinguished by the Missouri Supreme Court in the *Midland* case, involved a state public utilities statute which specifically forbade the regulatory commission from taking any action which would modify or impair existing gas contracts. The court in upholding the regulatory commission's refusal to modify a gas contract in the light of such a provision noted that the public interest was in no way involved and then observed that the public interest was the basis of utility regulation.

The *Columbus* case was concerned with the regulation by a municipality of a street railway's rates through the device of a franchise contract. The court in upholding such a contract against the railway's claims that the enforcement of the rates set forth in said contract would result in a confiscation of its property in violation of due process did no more than recognize that the basis of such a regulatory scheme is the strict enforcement by the courts of each franchise provision. Clearly, this is to be distinguished from

a regulatory scheme like that of Sections 205 // and 206(a) providing for continuous rate adjustment.

The *Colorado* case involved an enforcement by the United States District Court of contract rates covering resale energy mainly on the basis of the dictum in the *Arkansas* case, *supra,* and the *Columbus* case, *supra,* after a determination by the Colorado Public Utilities Commission that those contracts could not be modified under the provisions of the state utility statute[7] because as to these contracts the generating company was not a utility subject to the statute.

The Supreme Court of Oklahoma in the *Oklahoma Gas* case merely reiterated the oft-repeated proposition that public interest is the basis of public utility regulation in a proceeding in which it refused to enjoin the Corporation Commission from inquiring as to whether certain existing gas contracts affected the public interest.

The *Smith Paper* case is just a declaration that under the Massachusetts statute a showing that existing contracts affect the general public welfare as distinguished from the interest and welfare of a particular customer must precede and condition the Commission's power to modify such contracts without any showing that any question as to the effect of filing provisions such as Section 205 of the Act was involved. The Commission, absent such showing, refused to modify at the request of the customer an existing contract between a utility and an industrial customer, relying on the *Arkansas* case.

In view of the foregoing, Staff Counsel submit that Sierra's contentions that constitutional limitations require the interpretation it urges of the rate filing and suspension provisions of Section 205 of the Act are without merit.

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E. State commission approval of Sierra's contract rate does not make it unalterable under Federal Power Act.

As we have already noted, Sierra seeks to distinguish *Midland Realty Co. v. Kansas City Power & Light Com-*

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[7] The Court declared the Colorado statute to make similar to the statute involved in the *Wichita* case, *supra.*

pany, 300 U.S. 109, and *Union Dry Goods Co. v. Georgia P. S. Corp.,* 248 U.S. 372, pointing out that those contracts had been entered into before the enactment of the regulatory statute—a distinction which, as we said, is without significance, for the contract here, entered into *after* the enactment of Sections 205 and 206, could clearly confer no rights in conflict with those sections under any tenable conception of the constitutional protection against impairment of the obligation of contracts by either the fourteenth or fifth amendments.

But Sierra further attempts to distinguish its contract from "ordinary private service contracts entered into without approval of any Government Commission" (Reply filed 4/17/53, p. 2) by saying (ibid 4):

> The entire contract in the present case was expressly made subject to the condition that it be approved and authorized by the State Commission before it should become effective, and it was so authorized after a full hearing at which all of the foregoing facts were presented. Thereafter it was filed with the Federal Power Commission, and thus became effective.

Even if this argument were here being addressed to the California Commission and that commission had jurisdiction of this rate, Sierra would still have failed to make its point, because it shows no provision of California law that makes the California Commission's approval of a rate, once given, a bar to future regulation of that rate. Whether one commission or legislature could so tie the hands of its suc-

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cessors may // be doubted, but the question is not even raised here.

Moreover, there certainly is no federal statute making prior federal commission approval such a bar, let alone prior state commission approval, particularly where the state commission could have no conflicting jurisdiction over the rate here subject to FPC regulation. And it is settled that federal commission regulation is not limited by prior state commission regulation, even where the state commission had jurisdiction. *United States v. New York Telephone Co.,* 326 U.S. 638, 647-648.

Sierra's further attempts to distinguish its contract from what it assumes are "ordinary contracts", because of the expenditures made in reliance on this contract and the opportunities of purchasing power elsewhere claimed to have been foregone by Sierra, even if well founded in fact, would constitute merely matters of degree not affecting the jurisdictional question involved.

II

No Sufficient Reason Has Been Shown for Holding Unlawful the Proposed Rate Providing Less Than a Reasonable Return.

As already noted, in stating the questions presented, there is no ground to question that even with the proposed increase estimated to amount to 28%, P.G.&E.'s charges to Sierra will provide less than a fair return from this part of P.G.&E.'s business, using the cost of service method of rate regulation used in prior Commission cases pertinent to the circumstances of this case. The staff does not believe that there is anything to show that the proposed rate is unduly

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preferential or // discriminatory or that there is any sufficient reason for using any other method of appraising its justness and reasonableness.[8]

A. The proposed rate will not be unduly discriminatory against or preferential to any other wholesale purchaser in interstate or intrastate commerce.

1. No undue discrimination again any other wholesale purchaser in interstate commerce.

The proposed rate is substantially the same as that applied by P.G.&E. in selling to California-Oregon Power Company (Tr. 212, 805), under P.G.&E.'s Rate Schedule FPC No. 6, as supplemented. That schedule is the only other one P.G.&E. has on file with this Commission involving a firm sale for resale in interstate commerce.

The two sales appear to be generally comparable except that roughly 1/7 of the costs to P.G.&E. of rendering service to Sierra represents costs for which there is no counterpart in selling to California-Oregon (Tr. 808-809). This is due to the investment in special facilities required for the transmission from P.G.&E.'s Drum substation and Spaulding hydro plant, on its interconnected transmission system, to Summit where delivery is made to Sierra and the additional cost of maintaining and operating these special facilities (Tr. 806-807). However, inasmuch as it does not appear

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that the rate to California-Oregon exceeds the cost // of service to it causing it to bear a disproportionate share of P.G.&E.'s total expenses, or that the ultimate consumers served by it were at a competitive disadvantage as compared to ultimate consumers served by Sierra, this differential in cost of service does not of itself make the proposed rate unduly discriminatory against California-Oregon or preferential to Sierra.

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[8] This is not to say that the Commission is legally confined to the use of that one method of determining the justness and reasonableness of rates. Clearly it is not. *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-586. But the staff believes that there is nothing in the facts disclosed by the record in this case which as a pragmatic matter warrants departure from that method here.

2. No undue discrimination against any wholesale purchaser in intrastate commerce.

The City of Redding receives wholesale service from P.G.&E. at a rate approximately 10 percent below the present rate to Sierra (Tr. 551).

The Cities of Alameda, Biggs, Gridley, Lodi, Palo Alto, Roseville and Santa Clara, and the Plumas-Sierra Rural Electric Cooperative and the Sacramento Municipality District receive resale service from P.G.&E. at rates substantially similar to the present rate in effect for Sierra (Tr. 547-549, 552-553). The Cities of Healdsburg, Ukiah and Lompoc receive similar service at rates which are higher than the present rate in effect for Sierra but which are closer to that rate than the proposed rate (Tr. 550).

These wholesale sales in intrastate commerce, which P.G.&E.'s witness thought (Tr. 816) comparable to the sale to Sierra, are like the sale to Sierra made under special contracts but for much shorter periods of time (Tr. 598, 604-605). Most of them will expire in mid-1954 (Tr. 598) at which time P.G.&E. will seek to apply rates substantially the same as the rate here proposed if it is unable to renegotiate such contracts on a voluntary basis prior thereto (Tr.

558, 598-599), in accordance with // the order of the California Commission, that such special contracts would, until their expiration dates, remain in force unless voluntarily changed by the parties (Exhibit 17, pp. 41-42).

Although the proposed increase will be in excess of the rates to intrastate wholesale customers by an estimated 38 percent in the case of the City of Redding, 28% in the case of Alameda, Biggs, Gridley, Lodi, Palo Alto, Roseville and Santa Clara, and the Plumas-Sierra Rural Electric Cooperative and the Sacramento Municipality District, and between 14% and 28% in the case of Healdsburg, Ukiah and Lompoc, such differences do not appear to amount to an undue discrimination against Sierra or preference to such other customers in view of the fact that the record clearly shows that the proposed rate to Sierra is still less than the cost of service to Sierra and will therefore not carry any disproportionate share of P.G.&E.'s total expenses and the further fact that neither Sierra nor the ultimate consumers served by it will suffer any competitive disadvantage by reason of such other lower rates (Tr. 963-967).

B. Whether the proposed rate is just and reasonable does not depend upon competitive conditions that may have existed previously nor upon consequences thereof.

Sierra insists that in determining what is a fair return to P.G.&E. for this business, consideration must be given to competitive conditions which, it alleges, entered into the negotiations culminating in the 1948 contract and are largely determinative of the respective positions P.G.&E. and Sierra now find themselves in.

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More particularly, Sierra contends that it entered into the 1948 contract, which called for a relatively very large investment upon its part, in lieu of obtaining its power supply elsewhere, only after it had obtained P.G.&E.'s offer of the low rate for the relatively long term of the contract.

It has made its investment, subjected itself to the exclusionary provisions of the contract for that long term, and foregone whatever opportunities may have existed in 1948 for alternative sources of power supply at the relatively favorable costs then prevailing—in other words borne all the burdens of the contract—and should not now be deprived of the major portion of the benefits which were the consideration for those burdens, and only part of which it has thus far enjoyed. In other words, P.G.&E., being fully advised and competent to determine and protect its own interests, decided that it would accept less than what would otherwise be a fair return, if it could get this business and be assured of the return provided by the terms of the contract even though it might be less than it receives on some of its other business, throughout the long term covered by the contract: hence the return provided by the contract must be deemed to have been regarded by it as a fair and reasonable return. This is sought to be supported by referring to the California Commission's purported action in approving this contract as providing less than a fair return upon the clear understanding that the deficiency in return would not be made up by other rates but would be borne by P.G.&E.'s stockholders (Exhibit 17, pp. 41-42) and by the California Commission's general practice in similar cases not to supersede contract rates made by P.G.&E. to meet threatened competition,

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as from publicly-owned generating plants (Exhibit 9, *Re Pacific Gas & Electric Co.*, 63 PUR NS 344, 349).

The record pretty clearly indicates that P.G.&E.'s decision to offer the low rate embodied in the 1948 contract was made to meet what it regarded as such a threat (for identification Exhibits 27, 28; Exhibit 17, p. 42; Exhibit 14, pp. 41-42, 44; Exhibit 16, pp. 1308-1311), although its staff did not think the offer necessary (Tr. 559).

The record also pretty clearly indicates that Sierra actually had no possibility of an adequate power supply from such a publicly-owned generating plant and succeeded in making a very favorable bargain, considering its actual circumstances (Exhibit 12, pp. 39, 59-60; for identification Exhibits 29, 30, 32, 34; Tr. 988-991, 1054-1063).

P.G.&E. now appears to have determined that it does not need to offer so low a rate to hold the Sierra business. And, of course, so long as the exclusionary provisions of the contract stand, that would necessarily be true. But staff counsel's attempts to open up the question whether, if the rate is increased as proposed by P.G.&E., the exclusionary provisions and other conditions which have the effect of retaining Sierra's business should be altered (Tr. 913, 917-922), evoke no substantial response on the part of Sierra (Tr. 913-917, 917-922). This may mean that those provisions are not in themselves of importance because as a practical matter Sierra now has no reasonable alternative supply of power, as its counsel stated (Tr. 916; see also Tr. 666-670).

The only question would seem to be whether, in determining what is a fair return for this business, P.G.&E. should

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be held bound by the // representations and agreement it made in 1948 as to a satisfactory return for the term of its agreement. Under the rate regulation practices heretofore followed by the California Commission and this Commission, no other customer of P.G.&E. will bear any greater burden if P.G.&E. is held to its 1948 representations and the California Commission has held that it should be (Exhibit 17, pp. 40-43).

On the other hand, if for similar reasons P.G.&E. had entered into similar arrangements covering a substantial part of its business, so that its financial stability and ability to obtain additional capital at reasonable rates were threatened, it would clearly be in the public interest to allow it such an increase as it proposes. The fact that only a very small[9] percentage of its business is involved would not seem to alter the principle. The staff accordingly does not believe that the proposed increase should be found unjust or unreasonable.

Conclusion

For the foregoing reasons the Commission's staff recommends that the accompanying findings be adopted and the order of March 13, 1953 suspending the proposed rate increase be vacated and this proceeding terminated.

Respectfully submitted,

Howard E. Wahrenbrock
Assistant General Counsel
Drexel D. Journey
Attorney
Counsel for Commission Staff

June 1953

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Requested Findings

1. P.G.&E., as the holder of licenses issued for the hydroelectric projects designated in the records of the Commission as Project Nos. 77, 78, 87, 96, 99, 137, 175, 178, 180,

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[9] 1.43%, Exhibit 19, p. 2; Exhibit 4, p. 2; Tr. 860.

181, 184, 187, 233, 335, 423, 444, 471, 502, 525, 606, 616, 619, 708, 737, 772, 776, 802, 803, 869, 889, 911, 926, 1017, 1018, 1031 1061, 1121, 1153, 1183, 1187, 1190, 1194, 1258, 1295, 1318, 1332, 1333, 1335, 1352, 1354, 1361, 1392, 1403, 1408, 1544, 1550, 1632, 1790, 1962, 2019, and 2118 is a licensee under Part I of the Federal Power Act.

2. P.G.&E. is also a "public utility" within the meaning of Part II of the Act by reason of its ownership and operation of facilities among others for the transmission, and for the sale to Sierra for resale, of electric energy which is transmitted from California and consumed at points in Nevada, which facilities are in addition to, and do not include, facilities for the generation of electric energy, facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or facilities for the transmission of electric energy consumed wholly by the transmitter. (Exhibit 2; Tr. 48-49, 51-52, 56, 57, 623).

3. P.G.&E. makes such sale to Sierra, as it has to that company or its predecessor since 1923, by transmission facilities extending from its interconnected transmission system in California at a transmission substation known as the Drum Station and a hydroelectric plant known as the Spaulding plant a distance of approximately 27 miles to a point of delivery at Summit near the Donner Pass in the

[2405]

Sierra Mountains, in // California. Sierra receives delivery at Summit and transmits the energy thence by its transmission facilities connecting with its interconnected transmission system by means of which it serves customers in eastern California in the vicinity of Lake Tahoe, and a large area in northern and northwestern Nevada.

The present interconnecting transmission facilities consist of two 60 kv, and one 110 kv, three-phase, single circuit wood pole transmission lines and appurtenant facilities. Energy deliveries over the 60 kv lines are metered at Summit, while those over the 110 kv line are metered at Sierra's "California" substation with adjustment for intervening transmission losses. (Exhibit 5; Exhibit 2, Tr. 16-18, 48-49, 51-52, 56, 57, 65-66, 192-198, 623).

4. In 1951, approximately nine tenths of Sierra's energy sales were made in Nevada, six-sevenths of its customers are located in Nevada, and seven-eighths of its revenues are from Nevada, the remainder, California (F.P.C. Form No. 1, 1951 Annual Report of Sierra Pacific Power Company, pp. 74, 74-A). Its purchases from P.G.&E. in 1952 constituted approximately 85% of its peak demand and 77% of its total annual energy requirements. ((Tr. 706, 1045) 1952, F.P.C. Form No. 1, Annual Report of Sierra Pacific Power Company, pp. 84, 85, 91). Approximately 86% of the kilowatt hours purchased from P.G.&E. in 1951 was used in the service of customers in Nevada (Ex. 23, p. 1387).

5. The sale by P.G.&E. to Sierra, the negotiation, execution and terms of the contract, and deliveries thereunder covered all energy delivered to Sierra without respect to [2406] the point of its ultimate consumption, // whether in California or Nevada, and at no time has any distinction of any kind been made or attempted by the parties, or, so far as the record shows, by any regulatory agency, for any purpose, based upon the points of ultimate consumption. (Tr. 30, 31).

6. The sale by P.G.&E. to Sierra of all of the energy delivered at Summit is a sale at wholesale in interstate

commerce, and subject to the provisions of Sections 205 and 206(a) of the Federal Power Act.

7. The following rate schedules have been filed with this Commission by P.G.&E. for resale service to Sierra (or its predecessor) prior to the tender of the Proposed Supplement No. 1 to its Rate Schedule FPC No. 3.

Rate Schedule No.	Other Party	Date of Agreement	Date Filed	Effective Date
FPC No. 1	Truckee River Power Company (Predecessor to Sierra)	3/23/23	2/17/39	9/1/23
FPC No. 2 (Supersedes FPC No. 1)	Sierra Pacific Power Co.	6/6/38	2/17/39	6/6/38
FPC No. 3 (Supersedes FPC No. 2)	Sierra Pacific Power Co.	3/4/48	6/7/48	1/1/48

8. The increased rate embodied in Supplement No. 1 to Rate Schedule FPC No. 3 has been satisfactorily shown to be such as to provide less than a fair return on the portion of P.G.&E.'s net investment rate base properly allocable to that service after proper allowance for all operating expenses, as shown by Exhibit 19, subject to the necessity for one or possibly more minor adjustments not affecting the validity of this finding.

[2407]

9. No other facts have been shown affecting the justness and reasonableness of the proposed rate, and it is therefore just and reasonable.

10. The proposed rate has been shown to be not unduly discriminatory or preferential.

11. The proposed rate is lawful.

* * * * * * *

No Number

UNITED STATES OF AMERICA

Before the

FEDERAL POWER COMMISSION

In the Matter of
PACIFIC GAS AND ELECTRIC COMPANY

Docket
No. E-6482

Reply Brief of
Pacific Gas and Electric Company

[2415]

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[2416]

[Title of Commission and Cause Omitted]

REPLY BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY

Introduction

In this brief Pacific Gas and Electric Company, seeking authority to increase its rates for electric service to Sierra Pacific Power Company, replies to the brief of the latter company opposing the increase. As in the opening brief the parties will be referred to as Pacific and Sierra, respectively. Since the brief of the Commission's Staff concludes that Pacific has met the burden of proof, imposed upon it by the Federal Power Act and by this Commission's order, to show that the proposed rate is just, reasonable and not unduly discriminatory or preferential this reply will be [2417] directed entirely to Sierra's brief. However, to the extent that the Staff's brief seems to accept, without discussion, some of the contentions of Sierra, this reply is intended to apply to the Staff's brief as well.

Statement of the Issues

Comparison of the three opening briefs on behalf of Pacific, the Commission's Staff and Sierra reveals agreement on a number of primary facts and principles of law.

It is not disputed that under the present schedule of charges Pacific will receive only a 2.6% return on its net investment in all facilities allocated to service to Sierra. It is stipulated that Pacific is entitled to a 5.5% return for its electric department (T. 675).* Thus Pacific's service to

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*References thus are to pages of the transcript of the hearing on this matter.

Sierra is producing revenue which yields less than one-half of what would be a fair rate of return. It is also undisputed that the increased charges proposed by Pacific will produce only 4.75% return, a rate of return still well below that stipulated to be reasonable.

The Staff's brief finds that the proposed rate is just and reasonable when measured by the cost of service including return at 5.5%, and concludes that there is nothing to justify departure from that standard as a measure of the reasonableness of the rate (Staff's Brief, p. 34).

To avoid any contention of discrimination against Sierra, Pacific has proposed a rate which will yield only 4.75%, the proposed tariff being equivalent to Pacific's Schedule F. P. C. No. 6 (Supplement No. 1) for service to The California Oregon Power Company and also equivalent to

[2418]

Pacific's regular filed tariff for intrastate resale service. Neither Sierra nor the Commission Staff find the proposed rate to be unduly discriminatory or preferential (Staff's Brief, p. 31; Sierra's Brief is silent on this point).

Since the reasonable rate of return is 5.5%, to require Pacific to continue to serve Sierra for a return of only 2.6% would amount to confiscation of investment in excess of eight million dollars devoted to service to Sierra.[1]

In the face of this obviously confiscatory return Sierra argues that it is in the public interest to require that the present rate remain in effect, "at least as long as Pacific earns more than it would save if Sierra's business were lost or abandoned." This contention requires the assumption that Pacific deliberately entered into a contract in 1948 by which it committed itself to a transmission line investment of more than one million dollars, and agreed to make an additional transmission line investment of similar amount when Sierra's load should require, all on the basis that it would not be *entitled* to any return or depreciation on the investment over a period which may extend until 1979!

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[1] The California Public Utilities Commission, herein called California Commission, in fixing rates subject to its jurisdiction has not permitted Pacific to recover any revenue from other customers to offset the present low return from Sierra.

This assumption is directly contrary to common sense and to the testimony of both parties that the purpose of the 15-year term of the contract was to protect Pacific's (and Sierra's) investment in transmission lines to be constructed in accordance with the contract for the service to Sierra. Sierra's strained argument simply ignores this fact and fails completely to explain how a rate so low as to be confiscatory is consistent with protection of the investment.

[2419]

It is obvious that Pacific could not even recover the cost of borrowed capital to make this investment, let alone provide anything for equity money on such a rate of return.

Without this assumption of a commitment by Pacific to perpetuate the present rate Sierra's arguments have no foundation. This brief will show that there was no such commitment because (1) it is contrary to the terms of the contract both as expressed in the contract and as contemporaneously interpreted by the parties, (2) it is not to be implied from adoption of a schedule of charges equivalent to Pacific's 1945 Schedule P-31 for intrastate resale service, and (3) it is not to be implied as a consequence of the fact that Sierra made the contract with Pacific in preference to a contract for Bureau of Reclamation power which could not be delivered when needed.

2419

The Staff's brief concludes that even if such a commitment were made it should have no bearing on the result since the principle involved is contrary to the public interest. With this we are in accord since a contract requiring such a large additional investment for public utility service which does not permit a recovery of a reasonable return on the investment would be clearly unreasonable.

If Pacific had made a contract on such an improvident basis the Federal Power Act would require this Commission to determine the reasonable and just contract to be in force hereafter (Sec. 206 (a)). However, the evidence demonstrates that Pacific did not make such an ill-advised contract but clearly contracted for protection of its investment and we need not pursue the point further here.

As we understand Sierra's position—and it takes considerable analysis to disentangle the structure of its argu-

[2420]

ment from its so-called "Abstract of Evidence" and the subdivisions of its "Argument"—this Commission is not bound by a rule of law in this case but is to act on the basis of its determination of the requirements of the public interest. Sierra has virtually abandoned its procedural point, urged in a barrage of petitions and motions demanding a termination of this proceeding as a matter of law, and has conceded that all of the issues are now before this Commission for determination. We would add only that the measure of the public interest is found in the requirement of the Federal Power Act that all charges demanded or received by any public utility "shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful" (Sec. 205(a)).

We submit that a rate of return of 2.6% is not just or reasonable but is confiscatory, and that an increase to 4.75% is justified and reasonable under all the circumstances. We turn now to our reply to Sierra's attempt to argue the contrary.

I.

Sierra and Pacific Agreed on a Term Contract Subject to Change by Regulatory Process for Protection of Their Additional Investments in Transmission Facilities.

A. This Commission Has Jurisdiction to Change the Present Contract Rate.

Sierra concedes, as it must, that the present service contract is subject to such changes as this Commission may direct in the exercise of its jurisdiction (Sierra's Brief, p. 50). If, as Sierra indicates, this must be deemed an express provision of the service contract, then it is difficult to see how Sierra can contend that the parties contemplated an

unchangeable rate. Indeed, we suppose that if Pacific's cost of service to Sierra had declined sufficiently Sierra would have demanded and been entitled to receive a reduction in the rate.

It is interesting to note that Sierra's brief nowhere states that Pacific *agreed* that the rate should remain unchanged for the entire contract term. Such a proposition too obviously flies in the face of the facts.[2] Yet, paradoxically, Sierra also contends by argument in its "Abstract of the Evidence" (pp. 30-31) and in its Point I (p. 48) that Pacific is committed to an unchanging rate. If all that Sierra means is that the present rate was intended to remain fixed until changed by the rate making process we do not quarrel with its position. Pacific has never contended that it had any arbitrary power, or, independently of regulatory process, any power at all to change its rate to Sierra. On the other hand, Pacific has always intended and understood that it may initiate a change in its rate to Sierra, just as in any other rate, through established regulatory procedure. That is exactly the course which it has followed here. The implied reservation to the Federal Power Commission of authority to modify the contract is the basis for Pacific's action.

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[2] See Pacific's Brief, pp. 21-25.

Pacific does not claim to be able to place in effect any increase in its charges to Sierra unless it sustains its burden of establishing before this Commission that the increase is just and reasonable in a proceeding which gives full opportunity to Sierra to be heard and to oppose the increase if it chooses. In the light of fair analysis Sierra's attempt to argue by epithet that change by this process is "repudia-

tion"[2a] or renders the contract "nugatory and valueless" becomes baseless accusation. Similarly, for Sierra to argue that its management cannot conduct its business on the basis of a contract subject to change by regulatory process is to deny the experience of every electric and gas utility dependent upon wholesale purchase for its supply of energy and gas.

[2a] The term "double dealing repudiation" which counsel for Sierra has seized upon so enthusiastically was used by counsel for Pacific only with reference to a contract with the City of Redding made about four months before the filing of the rate increase application from which the contract was voluntarily excepted by Pacific. This contract was made after a public election in Redding in which the voters expressed their choice for a contract with Pacific in preference to a concrete proposal from the Bureau of Reclamation. See California Public Utilities Commission Decision No. 43147, issued July 26, 1949 (not printed).

B. Pacific Did Not Give Up Its Right to Invoke the Rate Making Process to Increase Its Rate to Sierra.

Sierra could not concede, however, that the service contract is subject to change in the normal course of regulation without undermining its case. If Pacific could invoke the normal regulatory process for a rate increase Sierra could not claim that Pacific had voluntarily assumed the burden of increasing costs. It therefore attempted to prove that Pacific gave up this right when it executed the service contract without an express provision that the rate was changeable by the normal rate making process (Sierra's Brief, p. 48). We would have thought that the express and implied reservations of authority to the California and Federal Commissions to change the contract (Sierra's Brief, p. 50) were adequate expressions of Pacific's intention but Sierra ignores them. Instead Sierra attempts to draw a conclusion from comparison with Pacific's Schedule F.P.C. No. 6 for service to The California Oregon Power Company. That [2423] schedule contains a formula provision for adjustment of the rate to correspond with changes in Pacific's regular filed resale tariff for intrastate service.[3] It should be evident that this formula, incorporated in a 1952 contract after Sierra had contested the right of Pacific to obtain a rate increase, was adopted to forestall the argument made here. It cannot aid in the interpretation of a contract made four years earlier when there was no such contest.

It is even weaker for Sierra to argue (its Brief, "Abstract of the Evidence," p. 31) that the fact that a comparison was made by Sierra between Pacific's present rate and the Bureau of Reclamation's proposed rate for a 15-year period evidenced any intention or understanding that that rate could not be changed. This comparison was the only one that could be made between the two rates since future changes in the cost level could not be predicted. It would be absurd for Pacific to argue that the present rate could not be reduced by this Commission for 15 years simply because Sierra had made a 15-year comparison on the assumption of no change in rate level. It is equally absurd for Sierra to argue that for such a reason there can be no increase when fully warranted by increased costs.

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[3] We do not assume that this formula is binding on the Federal Power Commission. Most of the energy delivered under the California Oregon contract is resold by the purchaser within California.

Sierra attempts to bolster these arguments with references to testimony given in 1945 before the California Commission by Pacific's rate engineer. We will discuss them in a subsequent section of this brief since they relate to the adoption of the P-31 rate for intra-state resale service and form no part of the understanding between Sierra and Pacific as expressed in their 1948 contract.

[2424]

C. The Contemporaneous Evidence Demonstrates That the Purpose of the 15-Year Term of the Contract Was to Protect Pacific's Investment.

We need not rest our case on the weakness of Sierra's arguments. The direct and positive evidence of the contract itself and the virtually contemporaneous statements in the 1948 hearing before the California Commission prove that the purpose of the 15-year term was protection of the new investment.

Two prior contracts, each of which called for a new transmission line, had 15-year terms. Pacific's first proposal to Sierra in 1947 was for a new line and a new 15-year term.

The 15 years was accepted without disussion throughout the negotiations and without relation to the rate.

It is significant that the contract relates the 15-year term to the completion of the new 110,000 volt line and requires a new 15-year term to begin when a second such line is completed and placed in operation to meet Sierra's requirements.

When to this internal evidence of the contract is added the statements of both parties made before the present controversy arose there can be no doubt that the term of the contract was intended to protect their respective investments. As to the reason for the 15-year term, Mr. Pollard testified for Pacific before the California Commission in 1948:

> "Well, of course, that was—on our part was in order to guarantee that we would have business for a long enough period of time *to warrant us in making the investment** in the cost of the new line and amortizing it. And, furthermore, followed the same pattern as
>
> [2425]
>
> previous contracts we have had in each of which instances a substantial investment was made for service of this customer. And, similarly, 15-year contracts were taken at each of those times for that reason." (Ex. 12, p. 12)

In the same proceeding Mr. Tracy testified for Sierra on the necessity for a 15-year contract.

> "When load conditions are such that you have to have additional capacity it might be that that additional capacity could be arranged to carry you over for a short period—be sufficient to carry you over for a short period, but in case where you have to go to a

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*Emphasis ours, throughout the brief.

> relatively large investment it is only fair and business —proper business that the Company you are negotiating with *gets a proper return on the investment for that period.* That is the basis upon which we would operate ourselves, we would not expect anybody to go to a large investment which is necessary in order to give the Company capacity they need for any shorter period than that." (Ex. 12, p. 26)

In the same proceeding the following occurred on cross-examination of Mr. Tracy:

> "Q. This contract effectively tie Sierra's hands for 15 years, will it not?
>
> A. In what way do you mean?
>
> Q. Well, because of the fact that you are prohibited from developing any further power facilities of your own?
>
> A. No, I do not think that is true. The contract is worded in that way, if the parties have a modification that is justified I think the parties can get together on it. In order words, only the—the principal thing that the selling party would have—I might be corrected on this if I am wrong from P. G. & E. Company—would be
>
>
>
> idle investment. In other words, if we had a development that we found feasible and it came in at a time when any investment was [not][4] made idle by the P. G. & E. in other words, at a times when they might have to put in additional investment even to serve it, it would not penalize P. G. & E. if we went ahead on it and we could make arrangements with them to do so." (Ex. 12, pp. 33, 34)

In other words Mr. Tracy believed that Pacific's primary concern was its investment and that a modification of the contract for Sierra's benefit would be justified under any circumstance where Pacific's investment was protected. If Mr. Tracy had exhibited the same reasonable attitude which he expected from Pacific in 1948 toward Pacific in 1952 when requested to renegotiate the present rate in accordance with the order of the California Commission[5] this proceeding would doubtless have been unnecessary.

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[4] The context requires insertion of the "not" at this point.

In the present proceeding in 1953 Mr. Tracy testified that in his 1948 testimony before the California Commission he gave all the reasons which he could think of in support of the contract (T. 672). The transcript of that proceeding (Ex. 12), will be scanned in vain for any indication that Pacific intended to give up any right to initiate a rate increase or that Mr. Tracy ever had any such understanding. Are we to believe now that it was mere oversight that when the 15-year term was mentioned in 1948, Mr. Tracy thought only of a proper return for Pacific's investment rather than a guaranteed rate for Sierra, even though he was obviously looking for reasons to satisfy his Nevada opposition?

[2427]

Not quite two years later, before the California Commission in 1950, Mr. Moulton, Pacific's Vice President and Executive Engineer, explained the difference between the 15-year term of the Sierra contract and the 5-year term of other resale contracts as follows:

> "We finally made a 15-year contract with Sierra Pacific. *We made a longer contract because we under-[took]*[6] *to build an additional line* to supply them and

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[5] Exhibit 17, pp. 41, 46-47, and T. 987, 988.

[6] The text has "understood" at this point, clearly a reporter's error.

> *we felt we needed that protection of a long contract."* (Ex. 15, p. 541)[7]

Even in 1952 after Sierra had determined to oppose any increase by Pacific, Mr. Tracy testified for Sierra before the California Commission on cross examination as follows:

> "Q. While the Commissioner has stated that the record in the contract proceedings contains the support for the contract or purportedly it did, you made the statement that you made this 15-year contract because you wanted to have assurance of power supply and that it was the best source of power at reasonable rates. Is it not a fact, Mr. Tracy, that Pacific Gas and Electric Company was insisting on a 15-year contract in order to protect it in a very large investment that it had to make in facilities in order to bring power to the summit to supply to the Sierra Power Company?

> A. I think that works both ways. Yes, our company wished to have a firm contract too to cover our investment." (Ex. 23, pp. 1418, 1419)

Protection of investment is not accomplished by ignoring diminishing returns. Failure to allow a fair return on property devoted to public utility service is confiscation of that property. To argue that Pacific consented to possible loss of all return for up to 30 years on a new investment in excess of one million dollars is absurd and contrary to the express testimony.

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[7] This testimony also shows that Sierra is completely mistaken in interpreting Mr. Moulton's testimony as support for its position that the contract rate could not be changed. Mr. Moulton recognizes that the purpose of the 15 year term was to protect the new investment. This testimony was given within a few months after initiation of service over the new 110,000 volt line to Sierra, and the fact that an increase was not deemed warranted at that time does not constitute a bar to an increase under conditions of greatly increased cost.

We submit that the evidence establishes without contradiction that Pacific did not give up its right to a rate increase by means of normal regulatory procedure and that it is entitled to a rate of return which will protect its entire investment for service to Sierra.

II.

The Adoption in the Sierra Contract of Charges Equivalent to Those in Pacific's Intra-State Resale Tariff P-31 Does Not Support Sierra's Contention That Pacific Committed Itself to Perpetuate That Rate for the Contract Term.

When the present contract was being negotiated with Sierra in 1947 and 1948 Pacific had on file with the California Commission two tariffs of general application for intra-state resale electric service to customers who purchased all of their energy requirements from Pacific. One of these, Schedule P-31 (Ex. 20), offered a rate approximately 10% below the other (Schedule P-6, Ex. 8, p. 2) to resale customers who would enter into a five year contract for service. The contract with Sierra did not incorporate the P-31 rate as such. It simply provided a

[2429]

schedule of demand and energy charges equivalent to those in effect under the P-31 tariff, plus a stand-by charge, and incorporated certain of the conditions of that tariff.

A. The P-31 Rate Was Not a Fixed Rate But Was Actually Increased Twice by the California Commission.

Sierra would argue first that the P-31 rate was established as a fixed rate for the term of each five-year contract and therefore that the Sierra rate is a fixed rate for the 15 to 30 year term of its contract. We have already shown that the conclusion does not follow because the 15 year term was proposed for protection of the new investment long before the P-31 rate entered into the negotiations. The premise that the P-31 rate could not be changed is equally unsound.

The California Commission has twice increased the P-31 rate since its adoption in 1945. The first occasion was in 1950 in response to Pacific's application for a 6% rate increase. The second occasion was in 1952 when the California Commission superseded Schedule P-31 by Schedule R, which is equivalent to the rate proposed in this proceeding. In each of those cases the Commission excepted from the increase certain named customers but the balance were required to pay the increased rate beginning with the effective date of the general increase regardless of the fact that they were being served under term contracts.[9] This

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[9] As to the 1950 increase of 6%, Exhibit 18 shows that Pacific requested an increase in each of its filed schedules (p. 8) and was authorized to make such increase effective for service from April 15, 1950 subject only to the named exceptions (p. 16). Pacific estimated that it would receive additional revenue of $140,000 annually from resale customers as a result of this increase (p. 8).

As to the 1952 increase, Exhibit 17 shows that the California Commission authorized cancellation of all exiting schedules and transfer of customers to the increased schedules applicable to the service rendered, including Schedule R for resale customers (pp. 46, 85) subject only to exception for certain listed contracts.

The exception of Sierra from the 1952 increase was expressly stated by the California Commission to be for the purpose of allowing an opportunity for the parties to renegotiate the contract "in the light of the new basic resale schedule," i.e. Schedule R (Ex. 17, p. 41). The refusal of Sierra to negotiate (Tr. 988) does not convert this exception into a final disposition of the matter by the California Commission. The matter is pending before that Commission in a new proceeding. See Exhibit 22, pp. 4 and 5.

[2430]

is convincing evidence that the California Commission does not regard the P-31 rate as immune from changes when required by increases in the cost level.

The testimony of Pacific's rate engineer in 1945, to the effect that users of the P-31 rate were assured of the lower rate for a five-year term (quoted by Sierra in its brief at pp. 31, 49), sounds impressive when isolated from its context. We believe, however, that a study of the record of that proceeding will show that Mr. Beckett meant "lower than the P-6 resale schedule" and that he did not have in mind a fixed rate regardless of cost considerations. In any event the California Commission has set the matter at rest by granting the increases above described.

B. Pacific Did Not Give Its Right to a Compensatory Return When It Offered the Equivalent of the P-31 Rate.

The adoption of the P-31 rate level is also used by Sierra as the ground for a contention that Pacific committed itself to a non-compensatory rate level. Sierra argues that because the P-31 rate was conceded in 1945 to be non-compensatory when applied to a class of resale customers which did not include Sierra, therefore Pacific committed itself to a non-compensatory return from Sierra by adopting the same rate level. It should be obvious, however, that the

[2431]

statement as to the return from a given rate when applied to a certain class of customers is not necessarily true when the same rate is applied to another customer under different circumstances. In 1952 Pacific was able to earn a 2.6% return in its business to Sierra in spite of the sharp increase in costs subsequent to 1948. It should be evident that on the basis of 1948 costs Pacific must have anticipated a reasonable return.

There is no concession in the 1948 proceedings before the California Commission that the Sierra rate was expected to be non-compensatory. A California Commission staff member asked Pacific's witness whether, *if* the rate should prove non-compensatory, no burden would be placed on other customers. Pacific's witness agreed that under such circumstances other customers should not be burdened. We do not see how this can be taken as evidence one way or another as to how much return the Sierra rate was expected or intended to produce, nor as evidence that Pacific's stockholders did not expect to be fairly compensated from Sierra's business.

This Commission will realize, however, that while the new line remained lightly loaded it would hardly be likely to earn a full return. This, however, should not prevent realization of the full earning power of the line as utilization increases. The Staff's method of deriving cost of service and rate of return by averaging in with the system network the special lines devoted to service to Sierra eliminated from consideration the actual loading of these lines and the present 2.6% return thus computed does not reflect any particular stage in the growth of Sierra's load.

[2432]

C. The Proposed Rate Meets Sierra's Test Since Pacific Will Not Receive More Revenue Under the Proposed Rate Than It Could Save by Abandoning Sierra's Business.

Througout its argument Sierra is careful to qualify its contention as to maintenance of the present rate by conceding that Pacific is entitled to earn at least as much under the present rate as it would save if Sierra's business were lost or abandoned. We have already pointed out in our opening brief (pp. 29-32) that this reasoning is applicable only to a rate designed to retain existing business served by facilities which otherwise would be idle, and that it does not apply where a substantial additional investment is contemplated. However, even taking at its face value Sierra's test which compares revenues under the proposed rate with the costs which Pacific could save if it abandoned Sierra's business today the rate will qualify.

All of Pacific's investment in generation and transmission capital allocated to Sierra could be used almost immediately to serve other customers on Pacific's system, excepting only the three transmission lines from Drum to Summit. Pacific's load has been increasing at a rapid rate for many years and it is still engaged in expanding its generation and transmission capacity to meet the growing demands on its system. The increase in Pacific's sales of energy during 1952, as shown on page 69 of Pacific's Form 1 report to this Commission for that year, was 3.75 times the entire amount of Sierra's load for the year. Loss of Sierra's business then would simply mean freeing capacity for use elsewhere on the system.

The rate base allocated to Sierra by the Staff method (Ex. 19) consists almost entirely of generation, transmission and common utility plant and includes only 1.4% of

[2433]

the $1,861,765 invested in the three transmission lines used to serve Sierra. This results from the fact that the investment in these lines is treated as part of the system network, 1.4% of which is allocated to Sierra.

It follows that the cost of service derived by the Staff's method does not include more than a negligible amount for depreciation or return and related income tax on the investment in the three transmission lines. To put the matter in another way, if Pacific should lose Sierra's business today, substantially all of the $8,489,633 of capital investment allocated to Sierra would shortly be used to serve other system load and would be expected to earn a fair and reasonable return.

The same result will be reached if Sierra's erroneously conceived test is applied to Pacific's derivation of a rate of return (Ex. 4). In Pacific's computation the investment in the three lines is allocated directly to service to Sierra and all of it appears in the rate base. The revenue under the proposed rate falls short of full costs of service by $725,000 per year, a deficiency far in excess of any conceivable depreciation, return and related income tax allocable to the three lines. See Pacific's Brief, pp. 6, 7 and Appendix.

The conclusion of counsel for Sierra that the fact that Pacific earns some return shows that it is earning more than it could save if it lost the business is a superficial conclusion not supported by an analysis of the rate base on which the return is earned. On the contrary, it must be concluded that from the standpoint of Sierra and its customers, the proposed rate is as low as could reasonably be permitted by any method of cost calculation and by any test which has been suggested.

[2434]

III.

The Existence of Public Pressure Upon Sierra to Contract for Bureau of Reclamation Power Which Could Not Be Delivered When Needed Does Not Justify the Contention for a Rate Fixed Regardless of Cost.

A review of the record in this case and the three opening briefs will show that "competition" is a word of many meanings. Counsel for Sierra profess amazement that we should deny the existence of competition with the Bureau of Reclamation, whereas we fail to see how they can label a situation competitive when the consumer has only one feasible source for the supply of its needs. Despite this diversity of opinion as to what constitutes competition there is substantial agreement as to the facts of the situation and we propose to talk about those facts.

The first fact is that Sierra needed a substantial amount of additional power to meet its load requirements in 1949 and 1950.

The second fact is that the Bureau did not even hope to obtain appropriations from Congress and complete a single circuit line to serve Sierra before 1951 and probably not until 1952. The Bureau of Reclamation thus had no way of supplying Sierra's 1949 and 1950 requirements for additional power.

The third fact is that Bureau power as a source of supply for Sierra would have had many disadvantages even after service was initiated. Chief among these were (1) reliance on 125 miles of single circuit line, (2) reliance on a single hydroelectric project which could be affected by adverse water conditions, (3) requirements for standby service at "prohibitive" additional cost (Ex. 12, pp. 28, 31), and (4) the Bureau requirement that Sierra "wheel" power to municipalities and public agencies entitled to "preference" under reclamation law (Ex. 21, p. 17, par. ii).

The fourth fact is that in 1947 and 1948 there was considerable agitation in Northern and Central Nevada to get "cheap" government power. Public sentiment was aroused and Sierra was under pressure to make some sort of arrangement for obtaining power from the Bureau of Reclamation.

These facts are not disputed and whether counsel for Sierra labels the Bureau as a "competitive" source of power is really immaterial. The label adds nothing, but when counsel try to argue that Sierra lost a bargaining position when it entered into the contract with Pacific they have to insist on the label and ignore Sierra's actual situation. Realizing, however, that the facts are inescapable, they try to make it apppear that Sierra had a choice between two feasible sources of supply. To do this they have resorted to invention.

That awkward gap between 1948 and 1951 in Sierra's power reesources, if it chose to contract for Bureau Power, is "tided over" (Sierra's Brief, pp. 39 and 66) by counsel's construction of the Walker River development. Since both Sierra's President and its engineer are agreed that construction of that project would have taken a minimum of three years (Ex. 12, p. 34; T. 745), Sierra would still have been short of power in 1949 and 1950, even if it decided to construct the Walker River project in the face of high costs.

The statement of the 1953 Nevada Public Service Commission (Ex. 22, p. 2) containing its views as to the position of the 1948 Commission,[10] suffers from the same infirmity as the argument of Sierra's counsel. That Commission now states that if it had, in 1948, doubted the "validity" of Sierra's contract it would have ordered Sierra to construct hydroelectric plants on three rivers and a supplementary steam plant. Thus Sierra would have had to invest unknown millions of dollars in high cost hydro plants and a steam plant to be operated at low load factor with high fuel costs,[11] none of which could have been constructed in time to meet its 1949 and 1950 requirements. While we doubt the authority of the Nevada Commission to issue such an order we doubt even more that in 1948, faced with the practical requirements of the situation, it would have seriously entertained such an idea.

Disregarding the time required for construction of new plants and disregarding their high cost of construction and operation, counsel for Sierra reach new heights of economic absurdity when they contend that these additional plants would have been developed "to tide over the expected shortages until the Bureau's lines were adequate to meet all possible needs." Neither of Sierra's witnesses testified that capital investment in any of these plants could be justified on a

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[10] Neither of the two members of the Nevada Commission who appeared in the 1948 hearings before the California Commission is now a member of the three-man Nevada Commission, according to the letterhead in Exhibit 22.

[11] It will be recalled that Mr. Tracy's opinion that he could produce steam generated power for 7 to 8 mills was based on the assumption (1) that he generated *all* his power requirements in the steam plant and (2) that fuel was at the 1946 Reno price of $2.05 per barrel. It will also be recalled that Mr. Tracy was very much opposed to Pacific's original proposal of a fuel escalator clause. If Sierra operated a steam plant of its own its costs would escalate immediately with each rise in fuel oil prices.

"tiding over" basis, nor did they give any explanation at all as to how the shortage in 1949 and 1950 could have been met.

The fact of the matter is that although counsel for Sierra is correct in stating (Sierra's Brief, p. 19) that in October 1947 Sierra had before it a proposal from Pacific and a "plan" of the Bureau of Reclamation and the Colorado River Commission, the latter "plan" fell so far short of meeting Sierra's needs that Sierra never did make a serious endeavor to find out whether, or at what cost, the deficiencies in the Bureau's plan could be made up.

Nor did Sierra ever act like a buyer playing one competitor against another. Mr. Tracy explained to Pacific's General Manager in October of 1947 that his Company was not prepared to continue negotiations, that there was local political pressure to bring Shasta power into Nevada which *hampered Sierra's* negotiation and that Sierra could not afford to offend Shasta power advocates (Ex. 27, p. 4, statement of Pacific's General Manager October 8, 1947 at meeting of President's Advisory Committee). It is evident that Pacific was not given the impression that Sierra found anything desirable in the proposal for Bureau power. Instead Mr. Tracy was making it clear that he was faced with public pressure urging "cheap" government power and ignoring the practical requirements of the situation. The following testimony given by Mr. Tracy during cross examination by Mr. Wahrenbrock in this proceeding illustrates this point:

> "Q. Mr. Tracy, when Pacific Gas and Electric gave up the fuel escalator clause and submitted the proposed form of contract to you after the agreement on the demand and energy charge, what was your opinion as to why they were willing to give up that clause, which would have tended to protect them against at least one

of the larger elements of risk in so long a term contract?

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[Objection by Mr. Searls on ground of irrelevancy overruled]

* * * * * * *

A. They did not inform me as to the reason and I certainly would not take it upon myself to guess.

By Mr. Wahrenbrock.

Q. Did you think you had outsmarted them on that?

A. No. That isn't the correct answer. We thought that we had showed them sufficient reasons for proposing to us a lower rate.

Q. Namely the threat of taking your load someplace else.

A. The potential competition that was *very prevalent. The papers were full of it.* As I testified before, all the groups were active. The Chamber of Commerce had a power committee." (T. pp. 937, 938)

Notice that Mr. Tracy declined to state that he threatened to take his load elsewhere. To him the word "competition" seems to be synonymous with "public pressure" since he stated in his testimony that even after the contract with Pacific was signed and approved by the California Commission, he was bothered by "competition" (T. 939).

In the face of all this evidence, which boils down to the fact that Sierra could not get the power it needed except from Pacific and the fact that any alternative was bound in the long run to mean high but uncertain costs when all factors were taken into account, Sierra's argument that it gave up a bargaining position or that either it or its customers have lost anything by making a contract with Pacific for service at a rate subject to regulatory change is without foundation.

"The papers were full" of competition and it was "very prevalent," but this sort of competition was more of a problem to Sierra than to Pacific. Sierra had no illusions about

the desirability of a contract for Bureau power as is demonstrated by Exhibits 30, 32, and 34, consisting of intracompany communications which list Mr. Devore's or Mr. Tracy's objections to such an arrangement.

Sierra was not making fine calculations to determine the cost of various alternatives nor was it trying to extract from Pacific an agreement for an unchangeable rate. The 15-year term was important from the investment standpoint but was actually considered objectionable by some public power proponents who did not like Sierra to be tied up for such a period at any price. Sierra endeavored to and did obtain the lowest available rate from Pacific but this was a standard rate, available to qualified resale customers whether or not they had competitive sources of supply.

Pacific undoubtedly felt the effect of the public pressure and reexamined its position that the P-31 rate level was not adequate (Ex. 27, p. 4). When it concluded that it could offer this rate it did not expect that it would be fixed in the face of cost changes. The argument to the contrary seems to be only that because Pacific came down in its price it must be implied that it also gave up its right to the use of the rate-making process. There is no basis for such a conclusion.

When called upon at the California hearing in 1948 to justify making the contract with Pacific, Mr. Tracy attempted to educate the public representatives from Nevada to the facts of the situation which Sierra then faced. He showed that he really had no choice in the matter.

He did not claim that the 15-year term was agreed upon to secure a favorable rate; he explained that it was a necessary protection for the new investments to be made. The public representatives were satisfied with this and withdrew their opposition (T. 672).

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In a few words, neither Sierra nor public opinion were demanding a fixed rate, nothing in the situation required a fixed rate and nothing in the negotiations, the contract, or the explanations of the contract in the 1948 proceeding ever suggested that a fixed rate had been discussed, much less agreed upon.

Conclusion

The issue in this case is whether Pacific's proposed rate increase is just and reasonable under the Federal Power Act. The present rate yields a return so low that its continuance would be confiscatory. Pacific's proposed rate will yield a return of only 4.75%, which is clearly reasonable when compared with the stipulated reasonable rate of return of 5.5%.

Sierra has shown no valid reason why it should be exempted from the increase in costs of generation and transmission of power nor why this Commission should disregard Pacific's need for additional revenue to cover costs of service and maintain its financial integrity.

It is respectfully submitted that Pacific has shown that the present rate is unjust, unreasonable and unduly preferential and that the proposed rate is just, reasonable and not unduly discriminatory. The requested increase should be authorized.

ROBERT H. GERDES
RALPH W. DUVAL
FREDERICK T. SEARLS
Attorneys for Pacific Gas and Electric Company

WHEAT, MAY & SHANNON
ROBERT E. MAY
Of Counsel

Requested Findings

1. Electric power generated and transmitted by Pacific Gas and Electric Company entirely within California is sold at wholesale and delivered to Sierra Pacific Power Company at Summit in California near Donner Pass under Pacific Gas and Electric Company's rate Schedule F.P.C. No. 3, effective as of January 1, 1948.

2. Sierra Pacific Power Company transmits some of the electric power received from Pacific Gas and Electric Company for sale to customers in California and transmits the balance to its customers in Nevada. By far the larger part of the energy received, approximately 86% in 1951, is thus transmitted to Nevada.

3. The sales of power by Pacific Gas and Electric Company to Sierra Pacific Power Company at Summit are sales at wholesale in interstate commerce subject to the provisions of Sections 205 and 206(a) of the Federal Power Act.

4. Pacific Gas and Electric Company's present rate Schedule F.P.C. No. 3 provides revenue which, after proper allowance for all operating expense allocable to service to Sierra Pacific Power Company, yields a rate of return on

the net investment rate base properly allocable to such service which is so low that said rate is unjust and unreasonable and constitutes an undue preference to Sierra Pacific Power Company.

5. Pacific Gas and Electric Company's proposed rate increase contained in its proposed Supplement No. 1 to Schedule F.P.C. No. 3 will provide revenue which is less than is necessary to yield a reasonable return on the net investment rate base properly allocable to the service to

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Sierra Pacific Power Company, after due allowance for all operating expense allocable thereto.

6. No other facts have been shown affecting the justness and reasonableness of said proposed rate.

7. The proposed rate is just and reasonable.

8. The proposed rate is not unduly discriminatory or preferential.

* * * * * * *

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UNITED STATES OF AMERICA

Before the

FEDERAL POWER COMMISSION

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY	Docket No. E-6482

Reply Brief on Behalf of Sierra Pacific Power Company

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[Title of Commission and Cause Omitted]

REPLY BRIEF ON BEHALF OF SIERRA PACIFIC POWER COMPANY

Introduction

The significant feature of the opening briefs of both the Commission's Staff and Pacific is that, instead of coming to grips with the only substantive issue presented, both are devoted primarily to the destruction of a non-existent "straw man", and in the process both present arguments leading inevitably to the novel and unprecedented proposition that no special contract for the sale of power at a less than compensatory rate in order to meet competition can be valid and binding, even when entered into with Commission approval.

Both briefs proceed on the erroneous assertion that Sierra is contending that private rate contracts are beyond the regulatory powers of State and Federal Power Commissions, and advance eloquent arguments and cite numerous cases to disprove Sierra's supposed proposition. But Sierra has never taken any such absurd position. Sierra's sole contention is that a special contract such as that here

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in issue, which has // been duly approved by the State Commission and accepted for filing by the Federal Power Commission, is valid and binding and can be modified only after a showing that it has become so unreasonable and burdensome that the public interest requires its modification.

Commission's Staff concedes that the present contract rates do not create an undue burden upon Pacific or upon its other consumers, but treat the contract as a nullity and argue that the only issue is whether the proposed new rate is reasonable and non-discriminatory. Pacific, on the other hand, recognizes that before such a contract can be modified, it must be found to be unreasonable, but then advances the extraordinary theory that the contract rate is unreasonable and illegal solely because it produces less than a fully compensatory return—which it was designed and intended to do—whereas the proposed new rate is legal and reasonable because it also produces less than a fully compensatory return!

It follows inevitably from either argument that no contract to furnish power at less than a fully compensatory rate for the purpose of meeting competition can be binding, even when entered into with the consent of the Commission, for all the seller has to do to be relieved of his obligation is to show that the rate is less than fully compensatory. This is a novel proposition and we are quite certain that it is not and should not be the law.

Special contracts at low rates entered into for the purpose of meeting competition have long been an integral part of public utility rate structures in this country. They have been recognized by the Interstate Commerce Commission and by nearly all State Commissions, and we have never heard it suggested that the Federal Power Commission

took a different view. // Certainly, no argument is presented, either by Commission's Staff or by Pacific, indicating that such contracts are against public policy. It is surprising, therefore, that in this proceeding, which so far as we are aware is the first involving an attempt by a party to such a contract to repudiate its obligations while retaining its benefits, both Commission's Staff and Pacific should take the position that all such contracts are *per se* meaningless. This is particularly surprising in view of the fact that not a single case is cited, either by Commission's Staff or by Pacific, which holds that a duly filed special low rate competitive contract can be modified merely by showing that the rate is less than fully compensatory. Yet that is the only issue presented in this proceeding.

Point I

The Arguments and Cases Presented by the Commission's Staff Are Irrelevant to the Issue in this Proceeding and Are Based on the Untenable Proposition that No Special Contract to Sell Power at Less than a Compensatory Rate for the Purpose of Meeting Competition and Holding Business Can Ever Be Enforceable.

Commission's Staff shows a cynical disregard for the factual background of the present contract, apparently assuming that it is utterly immaterial whether Pacific induced Sierra to give up all opportunity of obtaining cheaper power elsewhere in return for its promise to furnish power at comparably low rates for at least fifteen years, and now, when the threat of such competition no longer exists, brazenly seeks to repudiate its obligations. Nor do they

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seem in the least disturbed // by Pacific's callous repudiation before this Commission of the sworn testimony which it presented before the State Commission when it was seeking to obtain the approval and enforcement of the present contract.

In its zeal to tear down the non-existent "straw man" (that Sierra is attemping to challenge the power of the Commission to regulate rates), Commission's Staff has not only disregarded all such considerations, but seems actually to be seeking to limit the Commission's regulatory authority by taking from it the power to authorize a utility to enter into such a contract as the present, even though it might be in the public interest to do so. For if, as Commission's Staff contends, a utility may at any time obtain full "reasonably compensatory" rates by merely filing a schedule calling for such rates, a contract to sell power at a lower rate, even though legally entered into and duly approved and filed with the Commission, would be meaningless. Yet, this, we submit, is the inevitable corollary of Commission's Staff's argument.

Under Point I of its brief Commission's Staff presents a series of arguments under five separate sub-headings, all leading inevitably to this strange result. We shall briefly discuss each of them, in order to demonstrate that each is either irrelevant to the issues here presented, or erroneous.

Before discussing these arguments in detail, however, we would like to point out at the outset that at least the first three Points presented by Commission's Staff seem to deal primarily with the question of procedure which Sierra raised in its earlier motions in the present proceeding. In our judgment that question is moot. While we still believe that the proper procedure in a situation of this kind would be to bring a proceeding under Section 206 of the Federal Power Act, we recognize that having accepted

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jurisdiction of // an application under Section 205, the Commission can, as it has done in the present case, take testimony and reach a decision on all substantive questions involved. It follows that cases merely showing that contracts can be modified in a proceeding commenced under

Section 205 are not, in our judgment, relevant. In the present proceeding the substantive question is whether such a contract as the present one can be modified in a proceeding brought under any section of the Federal Power Act without a substantive finding that it is contrary to the public interest. On this issue Commission's Staff has cited no cases whatever.

A. That "Sierra's argument would nullify the efficacy of the statutory method of rate regulation".

Under this heading Commission's Staff eloquently cites cases holding that only filed rates are legal, and that such rates can only be changed by a Commission in the manner provided by statute. We agree. But the existing contract rate is a filed rate and therefore a legal rate.

Commission's Staff's conclusion under this heading, that to permit a selling utility by contract to bar the Commission from performing its regulatory powers "would thwart and defeat the statutory scheme", is equally irrelevant (Staff's brief, p. 14). Sierra concedes that the contract is subject to regulation. The only question is how and under what circumstances the Commission's regulatory power can and should be exercised to permit the contract to be modified.

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B. That "The terms of Section 205 authorize alteration of filed rates even though embodied in contracts."

While Commission's Staff cites no authority in support of this point, it bases its argument on a purported analysis of the statute. As it concedes later in its brief, the answer to this question depends entirely on statutory construction. The only authoritative construction of a statute containing provisions analogous to those in the Federal Power Act which has so far been called to our attention is the decision of the Supreme Court of the United States in *Wichita R. R. & Light Co. v. Public Utilities Commission of the State of Kansas, et al.*, 260 U. S. 48. As the Supreme Court there categorically held:

> "* * * the filing of a schedule of changed rates under that section [the section analogous to Section 205 (d) of the Federal Power Act] cannot accomplish the result of abrogating contract rates." (Id. at p. 56)

The Court there pointed out that under this type of statute a contract rate could only be modified after a finding that the existing contract is so unreasonable that the public interest requires that it be modified.

C. That "The legislative history and administrative interpretation of Section 205 show contract rates are not exempt from alteration".

This point, like its predecessor, is again primarily procedural. As we have previously indicated, we recognize the right of the Commission to pass on the substantive issue here presented.

Thus, even though we still believe the better practice would be to proceed under Section 206, we agree that if the

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Commission should now conclude that the present // contract is reasonable and should not be disturbed, it is clearly within its power to reject the proposed new rate in this proceeding.

That is what we contend the Commission should do in the present instance, and we have no doubt that that is what the Commission could have done in the *Los Angeles* case upon which the Commission's Staff places so much reliance. (*City of Los Angeles v. Nevada-California E. Corp.,* 2 FPC 104, 108-109.) That is the proceeding in which this Commission, in answer to the contention of a utility that it had no remedy if the rates under its contract with a municipality proved inadequate because the municipality was exempt from Commission control, said that the utility could always proceed under Section 205(d) by filing a schedule of higher rates. We have no doubt that if the utility filed a schedule of higher rates under that Section, and then showed that the existing rates were so low as to impair the utility's ability to perform its obligations, the Commission could hold the contract rates unreasonable and order higher rates, even though the proceeding had been commenced under Section 205(d). Conversely, we are confident that if the municipality were able to show in such a proceeding that the contract rates were embodied in a valid special contract, such as the present, where the low rate had been agreed to for a valid consideration and with the consent of the Commission, and that the rate was not injurious to the public interest, the application would be rejected.

Similarly, in the *Panhandle* cases,* although the proceedings were brought under provisions of the Natural Gas Act which are analogous to Section 205 of the Federal Power Act, the contracts involved were so clearly impossible of performance and contrary to the public interest that the Commission in the exercise of its plenary power

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was amply justified as a matter of // substantive law in modifying or abrogating them. But we are confident that if in those proceedings the purchasers had been able to show that the contracts were reasonable, enforceable, and not injurious to the public interest, the Commission would not have modified them.

**Panhandle Eastern Pipe Line Co.*, 9 FPC 443; *City of Detroit v. Panhandle Eastern Pipe Line Co.*, 6 FPC 1044.

While these cases were relevant to the earlier, procedural issue raised by Sierra, that the present proceeding was improperly brought under Section 205 and should be brought, if at all, under Section 206, we submit that none of them, nor, so far as we are aware, any other cases cited by Commission's Staff have any bearing upon the substantive question here presented: whether a filed and legal special contract can be changed without a showing that it is contrary to the public interest.

D. That "Constitutional considerations do not require the interpretation of Section 205 urged by Sierra".

In support of this contention Commission's Staff relies on *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109. As we think we have pointed out on pages 53 and 54 of our principal brief, that case is inapplicable to the case at bar for the very reason now pointed out by Commission's Staff itself. Immediately after its discussion of the case, the Staff says, at page 23:

> "That Sierra's contentions here, like those of the contract customer in that case, really involve only a problem of statutory construction is clear for a reason similar to that given by the Court there (300 U.S. at p. 113):
>
> 'These questions are to be decided upon the construction * * * put upon the statute. And that law is to be taken as if it declared that rates made in accordance with its provisions shall supersede all existing contract rates.'"

As we demonstrated in our principal brief, the proper statutory construction to be placed upon the Federal Power Act is not that placed upon the Missouri statute involved in the *Midland Realty* case, but rather, that placed upon the Kansas statute by the Supreme Court of the United States in the *Wichita* case, *supra*.

All that the Supreme Court held in the *Midland Realty* case was that under a statute requiring all rates to be uniform, a rate contained in a private contract which had never been filed with the State Commission became illegal whenever the Commission established a different, uniform rate scale for the industry. With that decision we are in entire agreement. But that case would only be applicable under the Federal Power Act if the Commission, after a hearing and an appropriate finding of unreasonableness, had fixed a higher rate, and Sierra were insisting that even so, its contract was still binding. That, of course, is not the situation here, where we are dealing with a legally filed rate contained in a special contract under a statute which expressly recognizes the existence of rate contracts and the only question is how such a contract may be abrogated or modified. No such question was even involved in the *Midland Realty* case.

The Commission's Staff seems to overlook the fact that constitutional safeguards surrounding valid contracts are recognized by the Supreme Court in both the *Midland* and *Wichita* cases, and all that is involved in each case is a determination whether private rate contracts were modified or abrogated by a proper exercise of the State's police power. In the *Midland* case the Court held that the Legislature, in enacting a statute providing in effect that only rates fixed by the Commission shall be legal, had, by that Act, effectively exercised its power to abrogate private rate contracts whenever they were in conflict with a filed

Commission rate. In the *Wichita* // case, on the other hand, the Court held that the Kansas statute did not automatically abrogate existing rate contracts and that therefore an existing legal rate contract could only be abrogated or modified in the manner specified in that Act, *i.e.*, by a finding that the contract was unreasonable.

To put it another way, Commission's Staff, in relying on the *Midland Realty* case, must of necessity predicate its argument upon the proposition that the present contract itself was abrogated and rendered illegal because against the public interest by the passage of the Federal Power Act, just as the private contract in the *Midland Realty* case was rendered illegal by the fixing of a general rate schedule under the Missouri statute. As we have pointed out in our principal brief, the Federal Power Act, like the Kansas statute passed on in the *Wichita* case, refers expressly to rate contracts and specifies the method by which they can be modified or abrogated. Thus, they are not automatically abrogated and it is necessary under the Constitution of the United States that they be arbogated or modified only in the manner provided by the Act, *i.e.*, by showing that they are so unreasonable that the public interest requires their modification.

E. That "State Commission approval of Sierra's contract rate does not make it unalterable under Federal Power Act".

This is another "straw man." We do not and never have contended that the State Commission's approval makes the present contract unalterable under the Federal Power Act. We merely maintain that Sierra's contract, having been approved by the California Commission and accepted for filing by the Federal Power Commission, is at the present

time a legal and binding // contract, unlike the contracts passed upon by the Supreme Court in the *Midland Realty* case, *supra,* or in *Union Drygoods Co. v. Georgia P. S. Corp.,* 248 U.S. 372, and similar cases. The difference is basic. If the State or Federal Government in the exercise of its regulatory powers decrees that certain contracts shall be no longer legal (as in the *Midland Realty* case), that disposes of the validity of the contract. Where, as under the Federal Power Act, the statute provides that all rate contracts shall be filed, and that all filed rates shall be the legal rates until and unless modified as provided in the Act, a filed and approved rate contract is legal and binding until and unless this Commission itself takes the necessary action to find that it has become so unreasonable as to be contrary to the public interest. The purpose of the reference to the State Commission's express approval, as well as the filing of the contract with this Commission, is first, to show that the present contract rate is a legal rate, and secondly, to put to rest the absurd contention that this proceeding involves any attempt by Sierra to circumvent or limit governmental regulatory powers.

Point II

Commission's Staff Concedes That the Present Contract Is Not Injurious to the Public Interest, But Reaches the Erroneous Conclusion That Nevertheless It Can Be Superseded by the Mere Filing of Higher Rates, Provided Only That Such Rates Are "Reasonable and Non-Discriminatory".

On the vital issue of whether or not the present contract has become injurious to the public interest, we are prepared to rest our case on the two concluding pages of Commission's Staff's brief. Commission's Staff recognizes that the

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present contract was entered into to // meet what Pacific regarded as a threat of the loss of Sierra's business. To be sure, Commission's Staff seems to think that Sierra drove a hard bargain because it contends that the threat was not as real as Pacific believed it to be. The short answer to this gratuitous contention, which we do not believe is at all borne out by the record, is the "elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration" *Williston on Contracts,* Rev. Ed. § 115. As a matter of contract law we submit that it is clear beyond question on this record that the contract is a legal contract binding for its duration as to all of its terms.

Commission's Staff then concludes its brief with the following very significant paragraphs (Staff's brief, pp. 33-4):

> "The only question would seem to be whether, in determining what is a fair return for this business, P.G.&E. should be held bound by the representations and agreement it made in 1948 as to a satisfactory return for the term of its agreement. Under the rate regulation practices heretofore followed by the California Commission and this Commission, no other cus-

> tomer of P.G.&E. will bear any greater burden if P.G.&E. is held to its 1948 representations and the California Commission has held that it should be (Exhibit 17, pp. 40-43).
>
> "On the other hand, if for similar reasons P.G.&E. had entered into similar arrangements covering a substantial part of its business, so that its financial stability and ability to obtain additional capital at reasonable rates were threatened, it would clearly be in the public interest to allow it such an increase as it proposes. The fact that only a very small percentage of its business is involved would not seem to alter the [2459] principle. The staff accordingly does not believe that the proposed increase should be found unjust or unreasonable."

We agree with every word of this statement except the conclusion. It sustains our principal contention that the existing contract in no way places a burden upon the public interest, and agrees with our further oft-repeated concession that if it were ever shown that the contract did adversely affect the ability of Pacific to properly perform its functions "it would clearly be in the public interest to allow it such an increase as Pacific proposes" (Staff's brief, p. 34).

But on these facts Commission's Staff constructs the most complete *non sequitur* which we have read in many a year. Commission's Staff argues that the fact that no such injury to the public interest is created by the present contract "would not seem to alter the principle". What principle? Surely, the only principle involved here is the principle that a legal contract cannot be modified or abrogated by governmental power unless it be found that the public interest requires that it be so modified or abrogated.

We respectfully submit that in these paragraphs Commission's Staff has conceded that the present contract does not adversely affect the public interest, and we submit further that the fact that the contract might do so under different circumstances does not alter the principle that the contract is valid and binding until, and unless, it is found as a fact at some future date that it does adversely affect the public interest.

Pacific concedes in its brief (pp. 26-28) that it is to its interest to enter into agreements to sell power at less than compensatory rates when necessary in order to meet competition and hold existing business, provided the return is

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greater than the savings that would // be made if the business were abandoned. The record is indisputable that Pacific entered into just such a contract with Sierra for just that purpose, and that the contract rate still meets Pacific's own tests of "reasonableness". Commission's Staff agrees with the California Commission that under the practices followed by both Commissions no burden will fall upon Pacific's other consumers as a result of this contract. Commission's Staff also agrees that this particular contract does not adversely affect Pacific's financial stability. The only "interest" that would be benefited by the proposed increase, therefore, would be that of Pacific's stockholders. Yet Pacific itself has conceded that its company, and therefore its stockholders, are benefited when it enters into such a contract and thereby retains the business, as it did here. The only effect of granting the present increase, therefore, would be to permit Pacific's stockholders to "have their cake and eat it too" by depriving the consumers of Sierra of the benefits of the lower rates which they thought they had obtained when they abandoned their prospects of obtaining cheaper power elsewhere in 1948, and relieving Pacific of the burden it assumed in order to obtain the benefits to itself.

We respectfully submit that the contract was in the public interest, as well as in Pacific's interest, when it was entered into, and that it is equally in the public interest at the present time. Surely this Commission will not lend its offices to aid the stockholders of Pacific, having obtained all the benefits of their bargain when they induced Sierra to reject the proposals of the Bureau of Reclamation in favor of this contract, to repudiate their obligations thereunder at the expense of the consumers of electric power in the State of Nevada.

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Point III

Pacific's Brief, Like That of Commission's Staff, Proceeds on the Erroneous Assumption That Sierra Contends that the Contract Can Never Be Changed, and Reaches the Same Erroneous Conclusion That a Competitive Contract at Low Rates is Void *ab initio.*

Throughout its brief, Pacific makes assertions such as "The sole contention made by Sierra, as we understand it, is that the present rate is embodied in a contract having a term which may extend for a total period of 30 years *and that the present rate must remain unchanged for the entire period*" (Pacific's brief, p. 13). (Emphasis ours.) Of course, Sierra has never made any such contention, and we are at a loss to understand these repeated misstatements, which appear in both briefs, unless it be that the writers of each brief were aware that our true position is unassailable. Certainly Pacific seems to think so. For, after setting up this straw man, Pacific seeks to destroy it by advancing the very proposition of law upon which we rest our entire case: that "* * * if Pacific's rate of return becomes * * * unreasonably low then Pacific is entitled to an increase in the rate" (Pacific's brief, p. 15). Pacific restates this proposition in its conclusion as follows:

> "This contract on its face and in the light of all the circumstances attending its execution was subject to change by authority of this Commission whenever its terms became unreasonable". (Pacific's brief, p. 42)

This, of course, is precisely what we have always contended. The only difference between us is whether or not there is any showing in this record that its terms have become

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unreasonable. On this basic issue we sub- // mit that Commission's Staff is entirely correct, and that Pacific's arguments are without substance.

First, Pacific appears to make a half-hearted attempt to show that the rate has become discriminatory because Pacific has entered into a contract with California Oregon Power Company calling for a higher rate. As we have pointed out in our principal brief, the contract with that company, unlike the contract with Sierra, contained a clause expressly authorizing Pacific to apply for an increase of rates. In any event, as Commission's Staff itself points out at page 31 of its brief, no competitive advantage or disadvantage is caused by any rate differential between California Oregon and Sierra.

On the more vital issue of whether or not the rate itself has become unreasonable, we think Commission's Staff again is entirely correct when it points out that the public interest will not be injured even though the existing contract rate is continued in force.

Pacific's answer on this issue is, we think, most extraordinary, for their contention seems to be that the present contract rate has become "unreasonably low" solely because it has been shown that it produces a rate which is less than fully compensatory—which is exactly what it was originally designed and intended to do. It follows that Pacific's argument must be based on the proposition that no contract to sell power at less than fully compensatory rates can ever be "just and reasonable". Thus, while following a very different route than that advanced by Commission's Staff, Pacific reaches the same conclusion: that any special contract to sell power at less than compensatory rates in order to meet competition is void *ab initio.*

This is a surprising position for Pacific to take in view of the arguments which its representatives so eloquently

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made before the California Commission and // which they repeat in their present brief (pp. 26-28), that, when faced with the danger of losing business to a competitor, it is to the advantage of the company and its other customers to agree to a lower rate in order to retain the business, as long as "* * * the revenue is greater than the costs that would otherwise have been saved * * *" (Pacific's brief, p. 27). Apparently what Pacific really means is that it is to its advantage to try to induce a customer to accept such a proposition in the erroneous belief that Pacific intends to live up to it, provided Pacific can repudiate its promise as soon as the danger of losing the business is past.

In their effort to support this strange proposition Pacific takes many liberties with the record; most of them we believe are amply dealt with in our principal brief. A few of their arguments, however, deserve brief mention.

A. That there is nothing to indicate that the contract rate was to be permanent.

In view of the insistence with which Pacific asserts that "* * * it is impossible to find any promise, representation or commitment by Pacific with respect to the permanency of the rate" (Pacific's brief, p. 21), we desire to remind the Commission that the 1948 contract expressly provides that it shall "* * * be and remain in full force and effect until December 31, 1964 * * * unless extended as herein provided * * * " (Exh. 5, 4th contract, Art. 11).

We wish also to call attention to Pacific's own statement that "* * * the present service contract was the fruit of a long period of discussion and negotiation involving consideration and balancing of a number of factors by each of the contracting parties" (Pacific's brief, p. 21). Pacific's

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recital of these negotiations is // set forth at pages 17-18 of its brief, where Pacific states that, after it was evident that a third transmission line would have to be built in order to meet Sierra's needs, Pacific made an "* * * offer to construct such a line * * * on condition that a new fifteen year contract be entered into at the same special rate then in effect under the 1938 contract with the addition of a fuel escalator clause" (Pacific's brief, p. 17). After referring to Sierra's negotiations with the Bureau of Reclamation, and pointing out the drawbacks of the Bureau's offer, Pacific's brief continues: "Nevertheless, Sierra was under considerable public pressure to obtain so-called 'cheap' government power and early in October 1947 it asked Pacific if it could not make a concession in the offered rate. Pacific declined initially but three weeks later at a meeting in Reno offered Sierra its P-31 rate plus the same $30,000 per year standby charge which was then in effect" (Pacific's brief, p. 18).

How can it be more clearly stated that Pacific first offered a fifteen year contract at existing rates plus an escalator clause, and then, in order to meet competition from the Bureau, offered a fifteen year contract at the reduced P-31 rate without the fuel escalator clause? Surely Pacific did not intend that if its initial offer of a fifteen year contract at existing rates had been accepted, Sierra could have repudiated it as soon as Pacific had constructed the new 110 KV line. Pacific could not have more clearly stated that the purpose of its initial offer was to obtain the high rate for the full term of the contract, as the consideration for its agreement to construct the new line. How then can it now argue that a different result follows when it finally offered the lower P-31 rate?

The simple answer to the contention that the special rate was not intended to be permanent is that made by

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Pacific's own witness, Beckett, at the 1945 hearing before the California Commission, when he stated that one of the purposes in offering a five-year contract at the special P-31 rate was to induce the customer to enter into the contract by giving him the "* * * assurance that he will have service at this lower rate for a period of at least 5 years" (Exh. 10, p. 76).

B. That Pacific is not estopped from seeking a higher rate.

We have not given major prominence to this proposition because in our judgment Pacific is in any event bound by the terms of its contract. But even if a low rate contract were unenforceable, as the Commission's Staff and Pacific now contend, Pacific under the circumstances present in this case, would certainly be estopped under recognized principles of law from seeking itself to avoid its contractual obligations.

The argument that Sierra could not in any event have accepted the Bureau's proposal is wholly untenable. No one knows what further arrangements might have been made had Pacific not agreed to reduce its rate. Sierra could have developed its West Walker River project; or built sufficient additional steam plants to carry it over the short periods of peak load during the two years required for the Bureau to complete its line; or Sierra might simply have determined to stagger its load during the peak periods until the Bureau's line was constructed. It is quite apparent from the record that Sierra's customers in the State of Nevada were prepared to make considerable sacrifices in order to obtain the benefits of the cheaper power offered by the Bureau. The only reason these opportunities were abandoned was that Pacific finally offered a lower rate. Moreover, we think it is incontrovertible on this record

that it was solely to prevent the possibility of the acceptance of the Bureau's proposals that the low rate was offered. Now that all chance of obtaining cheaper power from the Bureau has been abandoned and is no longer available, Pacific is estopped, both morally and legally, from attempting to avoid its solemn obligations.

In any event, as we have pointed out above, such arguments are irrelevant. It is an "elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration". *Williston on Contracts,* Rev. Ed. § 115.

C. That "In placing the P-31 rate in effect Pacific did not intend that its stockholders should suffer any reduction in return".

As we think we have amply shown in our principal brief, it was made perfectly clear to Pacific at the time it obtained the California Commission's approval of its P-31 rate in 1945, as well as at every hearing before that Commission relating to the present contract, that the California Commission made it a condition of its approval of any special low rate contract to meet competition that any loss resulting from such contract would be borne by Pacific's stockholders, and not by its other customers. If Pacific had a different intent it should have presented it to the California Commission. Surely, it is estopped from raising any such contention now.

But, in any event, the only relevance of this question in the present proceeding is what is the fact, and not what Pacific may have intended. The fact is that Pacific's other customers are not burdened by the present rate in Sierra's contract, so that the public interest is in no way affected by it. As pointed out at page 34 of Commission's Staff's brief:

> "Under the rate regulation practices heretofore followed by the California Commission and this Commission, no other customer of P.G.&E. will bear any greater burden if P.G.&E. is held to its 1948 representations and the California Commission has held that it should be". (Ex. 17, pp. 40-43)

Thus, whatever Pacific's ideas may have been, the undisputed fact on this record is that the present contract can be continued in effect without any injury to the public interest.

Conclusion

So far as we are aware, this is the first proceeding in which a party to a special rate contract entered into to meet competition has sought the aid of a Commission in an effort to repudiate its obligations. We are surprised to find that Commission's Staff should appear so eager to sustain such an act of repudiation and particularly that it should advance the arguments that form the basis of its brief in the present proceeding.

We would not have expected Commission's Staff to urge that no special contract of this kind is binding or enforceable, because in doing so it is urging this Commission to limit its own power to authorize such contracts even if it should be deemed in the public interest to do so. We are even more surprised that Pacific should advance such an argument, because one would assume that with a little reflection, Pacific's management would realize that a time might well come when its very existence might depend upon its ability to enter into such contracts.

Let us assume, for example, that within the next few years the United States Atomic Energy Commission should

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develop a method of producing electric power // at substantially lower costs than those involved in the methods now utilized by Pacific. Let us assume further that the Atomic Energy Commission should then offer to establish an atomic energy plant for the purpose of serving all of Pacific's customers in California at much lower rates than those now charged by Pacific, provided those customers would agree to purchase their power from it. Pacific's management would thus be confronted with the choice of abandoning its entire investment of over $300,000,000, or of offering contracts for the sale of power at rates sufficiently low to meet the proposed new competition.

Pacific's customers would obviously be unwilling to reject the Atomic Energy Commission's proposal in favor of low rate contracts with Pacific unless they could be assured that Pacific would continue to furnish power at those low rates even if the Atomic Energy Commission should later remove the threat to Pacific by constructing the proposed plant in some distant part of the country. But, under the theory of law advanced in this proceeding by the Commission's Staff and Pacific itself, Pacific could not enter into binding contracts to furnish power at such a low rate, even with the consent of this Commission. Nor could this Commission, however much it might deem such a contract to be in the public interest, effectively authorize Pacific to enter into such an agreement. The net result would be that instead of being able to salvage at least some return from its huge investment, perhaps not enough to produce a "reasonable return" to its stockholders, but at least enough to make some repayment to its creditors, Pacific might have no alternative but to sell its $300,000,000 plant for scrap and go out of business.

Surely such a result would not be in the public interest.

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And surely this Commission would not want // to limit its power to authorize special contracts such as the present in order to avoid such a result. Yet that is just what both Commission's Staff and Pacific are now urging the Commission to do.

In view of Pacific's recognition that it is necessary to show that the present contract is unreasonable before it can be modified and Commission's Staff recognition that the public interest will in no way be injured by continuing the contract rate in force, and the absence of the citation of of any authority or plausible argument to the contrary, we respectfully submit that both as a matter of law and in the public interest, the Commission should recognize the validity of the existing contract and reject Pacific's application.

Dated: July 17, 1953.

Respectfully submitted,

WINTHROP, STIMSON, PUTNAM & ROBERTS,
Attorneys for Intervenor, Sierra Pacific Power Company,
Office and P. O. Address,
40 Wall Street,
New York 5, N. Y.

WILLIAM C. CHANLER,
ELLIOTT E. VOSE,
GERARD THOMAS,
Of Counsel.

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Before the

FEDERAL POWER COMMISSION

In the Matter of Pacific Gas and Electric Company	Docket No. E-6482

Reply Brief of Staff Counsel and Supplemental Request for Findings

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REPLY BRIEF OF STAFF COUNSEL AND SUPPLEMENTAL REQUEST FOR FINDINGS

Introduction

This reply brief is submitted in answer to the briefs submitted by counsel for Sierra Pacific Power Company (Sierra), and Pacific Gas and Electric Company (PG&E), insofar as the statements and arguments set forth therein have not already been fully anticipated in the main brief we have heretofore submitted in this proceeding.

Perhaps the principal error in Sierra's brief is in its assumption that when a schedule is filed embodying a change in a contract rate previously on file with the Commission, the previously filed contract or rate set forth therein must be found to be unjust, unreasonable, or unduly discriminatory or preferential, before the unilaterally changed rate can be allowed to stand.[1] But as we have already pointed out[2] the Commission's power under Section 205(e) of the Federal Power Act with respect to a suspended rate is the same as its power would be with respect to that rate under Section 206(a)—i.e., to fix and prescribe the just and reasonable rate or contract if it finds *the suspended rate* (not the previously filed rate proposed to be [2476] superseded by the suspended rate) // to be unjust, unreasonable or unduly discriminatory or preferential. There is nothing in the Federal Power Act that conditions the right and duty placed upon the seller to maintain just, reasonable and not unduly discriminatory or preferential rates upon its ability to obtain the consent of a particular buyer or upon a Commission finding with respect to the former contract or rates set forth therein. The sole condition to the statutory power and duty of the seller to keep its filed rates conforming to the statutory standard is that the Commission may suspend any changed rate and prescribe a rate in lieu thereof if it finds that the changed rate is unlawful. Without further arguing this point in this reply brief we will first show that Sierra has misread the statutes involved in the *Union Dry Goods, Midland* and *Wichita* cases in its attempt to find in the cases some basis for avoiding the clear terms of the Federal Power Act. We shall then notice certain minor contentions which should be rejected, and request the incorporation of certain more detailed findings in lieu of finding No. 10 heretofore requested in our main brief.

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[1] See particularly pp. 60-62 of Sierra's brief.

[2] See pp. 11-21 of our main brief.

I. The Union Dry Goods, Midland, and Wichita Cases Are Not Subject to the Statutory Distinction Sierra Seeks to Draw.

In an effort to escape the clear holdings of *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372, and *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, and other cases cited in our main brief concerning the propriety of a rate filing under section 205 of the Federal Power Act such as PG&E seeks to make in this proceeding, even though an abrogation of contract be

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thereby worked, // Sierra has endeavored to distinguish the *Union Dry Goods* and *Midland* cases, *supra*. This it has done by attempting to show that in each of those cases the respective State utility regulatory statute,[3] unlike the Power Act, forbade the initiation by a utility of any rate schedules, requiring instead that all rates charged be promulgated by the state utilities commission. Sierra argues that it was because the contracts there involved contained rates not so promulgated, that the contracts had to fall (Sierra's brief pp. 51-55). It maintains that those cases are consequently of no value in interpreting the scope of rate filing and suspension provisions of a regulatory statute such as the Power Act which permits the initiation of rates by the utility. Rather, it insists that *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 U.S. 48, must be looked to, because, it says, the statute there involved is identical in terms with the Power Act.

We submit that this attempted distinction is not only not supported by the quoted portions of the respective statutes contained in Sierra's brief but is refuted by the very quotations relied upon by Sierra when viewed in their statutory context. Furthermore, we submit that the Missouri statute, and not that of Kansas[4] as Sierra alleges, is practically identical in term with the Power Act.

To support its contention that the Georgia statute forbade the establishment of any rate schedule by a utility, requiring instead that every rate charged be one promulgated by the

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Georgia Railroad Commission, // Sierra relies upon certain language from an Act[5] amending the then existing utility regulatory statute[6] to, among other things, extend the Commission's power and jurisdiction over dock, gas, electric, telephone and telegraph companies. The primary purpose of the language quoted by Sierra (Sierra's brief p. 52), i.e., "the power to determine what are just and reasonable rates and charges is vested exclusively in said commission," was to make clear the legislature's intention that the regulation of these additional companies be vested in the Railroad Commission as opposed to any other body.

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[3] Revised Code of Georgia, 1910, Second Title, Chapter 2, Art. 6, Sec. 2, §§ 2615-2670; Revised Statutes of Missouri, 1929, Chapter 33, Art. 4.

[4] Kansas Session Laws, 1911, c. 238.

But that the Georgia statute contemplated the establishment of rate schedules in a manner other than by Commission promulgation is evidenced by General Rule No. 4 of the Georgia Railroad Commission, which, after providing for the posting of maximum rates prescribed by the Commission,[7] went on to provide:

> When any change is made in such schedule, either by such company voluntarily, or pursuant to an order of the commission, such company shall immediately furnish a copy of said change to the office of the commission, and shall also post copies thereof in the same manner as above specified, as notice to the public that said change has been made.
>
> No advance in any rate, whether it be a maximum rate, or otherwise, shall be made without the consent

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[5] Georgia Acts, 1907, Part I, Title 6, § 5.

[6] Code of Georgia, 1895, Second Title, Chapter 2, Art. 6, Sec. 2, §§ 2185-2218.

[7] In an advisory opinion for S. G. McLendon, Chairman of the Georgia Railroad Commission, James K. Hines, Special Attorney to that Commission, points out that the Commission's power under the Georgia Constitution and the organic act is limited to the prescription of maximum rates and it cannot prescribe an actual rate. (Thirty-Eighth Report of the Railroad Commission of Georgia, 1910, pp. 23-25).

> of this commission first being obtained, nor shall such advance become effective until ten days thereafter; and no reduction in any rate shall become effective until three days, after notice has been given, as above required. (Thirty-Sixth Annual Report of the Railroad
>
>
>
> Commission // of Georgia, 1908, pp. 295-296. See Second Semi-annual Report of the Railroad Commission of Georgia, 1880, p. 5, for prior form of this rule. See also 1909 and 1910 Annual Reports, pp. 437-438, and 251-252, respectively.)

When treating the *Midland* case, *supra,* Sierra made no effort to show that the Missouri statute required all rates charged by a utility to be commission promulgated but argued that the Missouri statute specifically forbade contracts containing low rates to meet competition, which provision, it says, is not contained in the Power Act.

The language relied upon to show this (Sierra's brief pp. 53-54) is not language found in the Missouri statute in lieu of a provision against preferences and discriminations like that in Section 205(b) of the Power Act, but in addition to such a provision.[8] A reading of the entire statute shows that the language quoted by Sierra is from a provision designed, not to govern what rates might be filed, but to provide that in the charges actually made no deviation could be made from a filed rate by any device such as a rebate, drawback, etc.[9]

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[8] Par. 3, Section 5189, Article 4, Mo. Revised Stats. 1929, reads as follows:

> "No gas corporation, electrical corporation, water corporation or municipality shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

That the Missouri statute was not one under which only Commission prescribed rates could be charged by a utility or one under which only certain contract rates could be

superseded by filed rates, while all // others could not, is evidenced by the specific reference made by the Court in the *Midland* case (300 U.S. at p. 112) to the fact that the Missouri statute contemplated legal rates to be those established by (1) the filing by a utility of a new schedule of rates, or (2) promulgation by the regulatory commission.

Sierra insists (Sierra's brief pp. 55-57) that the Kansas public utility regulatory statute interpreted by the Kansas Supreme Court in *Kaul v. American Independent Telephone Co.*, 95 Kan. 1, 147 P. 1130, which interpretation was adopted by the Court in the *Wichita* case, *supra,* is identical in terms with the Power Act, and must be used to interpret the rate filing and suspension provisions of section 205.

We submit that even a cursory examination of the Kansas statute will show the opposite to be the case for, although section 20 of that statute provides for the filing of proposed changes in existing rate schedules, it does not appear to be intended that such filing should, in itself, be sufficient to change a contract rate. For nowhere in that section or elsewhere does it appear that the Kansas Commission was ever invested with any suspension powers such as are con-

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[9] The portions of section 5189, par. 2, quoted by Sierra are italicized in the following quotation of said section:

* * * *No gas corporation, electrical corporation,* water corporation or municipality *shall directly or indirectly* by any special rate, rebate, drawback or other device or methods, *charge, demand, collect or receive from any person or corporation a greater or less compensation* for gas, electricity, water or for any service renedered or to be rendered or in connection therewith, except as authorized in this chapter, *than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service* with respect thereto under the same or substantially similar circumstances or conditions.

tained in section 205(e) of the Power // Act. Rather, it affirmatively appears that the only power over proposed or existing rates possessed by that commission was pursuant to a section similar to section 206(a) of the Power Act. Without the protection for consumer interests afforded by such a suspension power, there is obvious reason for construing the filing provisions as narrower in effect than where the suspension power is conferred.

Indeed, the terms of the Missouri statute, which was involved in the *Midland* case, rather than the Kansas statute, are almost identical to the provisions of the Power Act. Paragraphs 1 and 3 of section 5189 of the Missouri statute, like Sections 205(a) and (b) of the Power Act, prohibit rates which are unjust, unreasonable, unduly discriminatory or preferential, while section 5190, par. 12; section 5191 and section 5190, par. 5; which are set forth in a note,[10] are counterparts of Sections 205(c), (d), (e) and 206(a) of the Power Act.

It therefore follows that as to PG&E's filing in this case, like the Missouri utility's in the *Midland* case, "it is clear that as against those specified in the contract here involved,

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[10] Section 5190, par. 12:

Have power to require every gas corporation, electrical corporation, water corporation and municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced, * * * all forms of contract or agreement and all rules and regulations the rates * * * filed * * * in accordance with the statute have the same force and effect as if directly prescribed by the legislature * * * enforcement of the rates in accordance with the statute did not violate either the contract clause of the Constitution or the due process clause * * *"

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relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation, water corporation or municipality; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation or municipality in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe * * *

* * * * * * *

Section 5191:

Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or municipality any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service, or to any general privilege or facility, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested gas corporation, electrical corporation, water corporation or municipality, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the gas corporation, electrical corporation, water corporation or municipality affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule,

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II. Other Contentions Should Be Rejected

Sierra's Requested Findings Should Not Be Adopted. We believe that each of the twenty proposed findings of fact and six proposed conclusions of law set forth in the appendix to Sierra's brief (pp. 69-73), should be rejected:

(A) While the proposed findings of fact Nos. 1, 2, 3 and 4 appear to be substantially accurate they are wholly inadequate.

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regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before

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or after the rate, charge, form of contract or // agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective * * *

* * * * * * *

Section 5190, par. 5:

* * * Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons, corporations or municipalities are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed and whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the property, equipment or appliances of any such person, corporation or municipality are unsafe, insufficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

(B) While the proposed findings of fact Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 appear to be substantially accurate they are each partially or totally unnecessary for a decision in this proceeding.

(C) While proposed findings of fact Nos. 15, 16, 17, and 20 may be supported by the record they are each totally unnecessary for a decision in this proceeding.

(D) The proposed conclusions of law Nos. 1, 2, 3, 4, 5, and 6 are each partially or totally incorrect and not appropriate to the issues presented.

Standby and Minimum Charge Provisions Misconstrued. On page 10 of PG&E's brief the point is made that the standby charge embodied in P&GE's contract with Sierra, like the minimum charge contained in its contract with the California Oregon Power Company, insures that power purchases will be at load factors for which the demand and energy rates were designed.

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While we do not deem it to be significant, we wish to point out that this is a wholly erroneous comparison. It is not the standby charge of the Sierra contract that accomplishes this but chiefly the exclusionary[11] provision combined with the power factor provision (Tr. 223-224, 438, 534-535, 543, 585-586, 921).

The Parol Evidence Rule Need Not Be Followed. PG&E makes the assertion (PG&E's brief p. 21), that this Commission should in the exercise of its regulatory authority be limited by the operation of the parol evidence rule. If this argument be deemed of any signficance it is a sufficient answer to note that Section 308(b) expressly provides that technical rules of evidence need not be applied by the Commission. Cf. *Montana Power Company v. F.P.C.,* 185 F.2d 491, 497-498 (C.A.D.C. 1950), *certiorari denied,* 340 U.S. 947, *rehearing denied,* 341 U.S. 912.

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[11] As noted in our main brief (p. 2) the contract with Sierra for its term generally prevents Sierra from obtaining any additional supplies of power from other than PG&E or from building additional generating facilities.

P.G.&E.'s Other Customers Would Not Bear Burden of a Deficiency in Return From Service to Sierra. Sierra contends that to the exent that its old rate fails to provide a fair return on its part of PG&E's total business, PG&E's stockholders undertook to absorb that deficiency by the voluntary action of PG&E in contracting for the old low rate in order to retain the business in the face of competitive alternatives (Sierra's brief, pp. 26-30). Also that this is the effect of the California Commission's recent refusal to

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authorize // the immediate application of PG&E's schedule "R" to Sierra and certain other special contract customers. From this it contends that no interests of consumers served directly or indirectly under other rates prescribed by the California Commission will be adversely affected by allowing the old Sierra rate to continue in effect. (Sierra's brief pp. 40-42.)

PG&E on the other hand refuses to admit that its stockholders must bear such deficiency under the orders of the California Commission (PG&E's brief pp. 26-31). In support of this it contends that the old Sierra rate was originally approved as providing the incremental cost of that service (i.e., the costs which would be saved if the service were abandoned) and hence that PG&E's other business must bear all the other costs. Only if the Sierra rate failed to provide incremental cost does PG&E admit that its stockholders must bear the deficiency to that extent (PG&E's brief, pp. 30-31).

This, if true, would in effect mean that to the extent that the Sierra rate fails to provide its allocated portion of PG&E's average cost of service, including a fair return on the investment, PG&E's other customers would have to make up the deficiency. But whatever interpretation may be made of the California Commission's original purported approval of the old Sierra contract, it is plain from that commission's most recent order and opinion of October 15, 1952 (Ex. 17, pp. 40-42) that it fixed PG&E's rates to all customers other than the special contract customers (including Sierra) upon the basis // of total costs of service and total estimated revenues from the application to the special contract customers of the same increases as authorized for other customers even though it did not prescribe such increases in the case of the special contract customers. In effect, then, the California Commission has plainly used average, not incremental, costs as a basis for allocation. Hence it has not placed the burden upon PG&E's other customers of absorbing any deficiency in revenues received from special contract customers but has left that deficiency to be borne by PG&E's stockholders.

PG&E's corollary contention that if it had abandoned the Sierra service in 1948 instead of entering into the contract for the low rate, its other customers would thereupon have had to bear the burden of carrying the fixed charges on the investment in plant left idle by the abandonment (PG&E's brief, p. 27), errs, of course, in that it overlooks the fact that the special facilities and any generating capacity not needed for PG&E's other business would thereafter properly be excluded from the rate base used in determining the rates for that other business and hence would not burden the other customers. Cf. *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590.

III. Supplemental Request for Findings.

Staff Counsel hereby requests the following findings in lieu of their prior requested Finding No. 10:

10-A. The proposed rate is substantially the same as the rate charged for the only other resale service rendered by PG&E in interstate commerce

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for which it has filed // schedules with this Commission (Tr. 212, 805). Although the total cost of rendering such other service is approximately 6/7 of the total cost of serving Sierra, the two sales appear to be otherwise generally comparable (Tr. 808-809). Inasmuch as it does not appear that the other rate exceeds the cost of rendering such other service or that the ultimate consumers connected therewith are placed at a competitive disadvantage as compared to ultimate consumers connected with this sale to Sierra, this cost differential does not of itself appear to make the proposed rate unduly discriminatory against such other customer or preferential to Sierra, or ultimate consumers respectively affected.

10-B. Inasmuch as the propsed rate to Sierra is less than the cost of serving it and neither Sierra nor ultimate consumers served by it will suffer any competitive disadvantage by reason of the fact that PG&E makes certain other comparable resale sales in intrastate commerce at rates estimated to be between 14% and 38% below the proposed rate, such differences do not appear to amount to an undue discrimination against Sierra or preference to such other customers, or the ultimate consumers respectively affected (Tr. 547-549, 550, 551, 552-553, 816, 963-967).

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Conclusion

For the reasons stated above and in our previous brief, it is respectfully submitted that the order of March 13, 1953, suspending the proposed rate increase be vacated and this proceeding terminated.

Respectfully submitted,

HOWARD E. WAHRENBROCK
Assistant General Counsel

DREXEL D. JOURNEY
Commission Staff Counsel

July 1953

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[2649]

[Title of Commission and Cause Omitted]

MOTION OF
PACIFIC GAS AND ELECTRIC COMPANY FOR REOPENING AND FURTHER HEARING

Pacific Gas and Electric Company, hereinafter called PG&E, moves for reopening of this proceeding in accordance with the following:

1. On February 2, 1953, PG&E filed with the Commission its proposed rate schedule Supplement No. 1 to Schedule F.P.C. No. 3 for service to Sierra Pacific Power Company, hereinafter called Sierra. The charges specified in said Supplement No. 1 were higher than the charges provided in said rate schedule F.P.C. No. 3, which latter schedule was in the form of a contract between PG&E and Sierra.

2. The proposed effective date of said Supplement No. 1 was April 6, 1953. By order adopted March 13, 1953, the [2650] Commission // suspended the proposed rates of Supplement No. 1 until September 6, 1953, and provided that said supplemental rate schedule should go into effect thereafter in the manner prescribed by the Commission in accordance with the Federal Power Act. By the same order, the Commission ordered a hearing concerning the lawfulness of the proposed rate.

3. By order adopted September 25, 1953 and issued September 28, 1953, the Commission declared that the proposed rates of said Supplement No. 1 had become effective as of September 6, 1953, subject to certain provisions of Section 205(e) of the Federal Power Act and made certain orders with respect to accounting and to refund in the

event that any portion of the increased rates should be found not to be justified.

4. After hearings held in accordance with said order of March 13, 1953, the Commission, by Opinion No. 270 herein adopted June 16, 1954 and issued June 17, 1954, found that the proposed rate of said Supplement No. 1 was just, reasonable and lawful and, that "if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful;" and in effect by order authorized PG&E to charge and collect from Sierra said proposed increase under Supplement No. 1 to Schedule F.P.C. No. 3.

5. On Sierra's petition to review the Commission's order in said Opinion No. 270, the United States Court of Appeals for the // District of Columbia Circuit, on May 23, 1955, set aside the Commission's said order and remanded the case to the Commission with instructions to dismiss the proceeding without prejudice to the initiation of a new proceeding under Section 206(a) of the Federal Power Act.

6. On February 27, 1956, the Supreme Court of the United States on writs of certiorari to said Court of Appeals affirmed the decision setting aside the Commission's said order, but instructed that the case be remanded to the Commission for such further proceedings not inconsistent with the opinion of the Supreme Court as the Commission may deem desirable.

7. On March 30, 1956, PG&E sent its check to Sierra refunding the amount of $382,022.37, which included $336,821.53, the amount of the increase collected from September 6, 1953, the day it was placed in effect, to June 16, 1954,

the date on which said Opinion No. 270 and the order therein contained were adopted by the Commission, plus $45,200.84 representing interest thereon at 6% to the day of payment.

8. By motion filed April 16, 1956, Sierra requested the Supreme Court of the United States (1) to amend its instructions upon remand to limit further proceedings before the Commission to the determination of the lawfulness of the contract rate "at the time of such further proceedings" and the fixing of the rate "thereafter to be observed and in force," and (2) to declare that any amounts

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paid by Sierra in excess of the contract rates were // unlawfully collected and that PG&E was obligated to make restitution of the excess payments. On May 28, 1956, the Supreme Court denied said motion without prejudice to the future determination of such rights as Sierra might have to restitution.

9. The opinion of the Supreme Court rendered February 27, 1956, which set aside the Commission's said order in Opinion No. 270, declared in effect that said order would be valid if supported by a finding that the contract rate adversely affected the public interest by being so low that it might (1) impair the financial ability of the public utility to continue its service; (2) cast upon other customers an excess burden; or (3) be unduly discriminatory. Said opinion further declares that whether under the facts of this case the contract rate is so low as to have an adverse effect upon the public interest is a question to be determined in the first instance by the Commission, and that if the proceedings satisfied in substance the requirements of Section 206(a) it would be immaterial that the investigation was not begun under that section.

10. On June 1, 1956, the Supreme Court remanded this case with instructions for such further proceedings consistent with its opinion as the Commission deems desirable. By amplifying and supplementing its findings in accordance with said opinion of the Supreme Court, the Commission will protect the public interest, supply omissions

arising from an erroneous // view of the law, and make the determinations necessary to establish the right of Pacific to collect and retain the rate of said Supplement No. 1 from and after June 17, 1954.

11. The Commission is, therefore, requested to reopen this proceeding in order to make findings as to whether the rate of said Schedule F.P.C. No. 3 was on and prior to June 17, 1954, and thereafter, so low as to have an adverse effect upon the public interest and whether the rate of said Supplement No. 1 was not in excess of a just and reasonable rate for the service rendered on and after June 17, 1954.

12. Although the record now contains evidence sufficient to support a finding by the Commission that said rate Schedule F.P.C. No. 3 was so low as to have an adverse effect upon the public interest, PG&E desires to present further evidence in support thereof showing that said rate was, prior to June 17, 1954, and ever since has been (1) so low as to impair the financial ability of PG&E to continue its service to Sierra; (2) so low as to cast upon other consumers an excessive burden; and (3) so low as to be unduly discriminatory. PG&E further desires to present evidence showing that the rate of said Supplement No. 1 was not in excess of a just and reasonable rate for the service rendered on and after June 17, 1954.

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Wherefore, PG&E prays that this Commission reopen this proceeding to receive evidence, hear argument, and make findings material to the issues herein above set forth as raised by the said opinion of the Supreme Court of the United States and that a date be set for hearing thereon.

Dated this 8th day of June, 1956.

Respectfully submitted,

F. T. SEARLS
JOHN C. MORRISSEY
ROBERT E. MAY
Attorneys for
Pacific Gas and Electric Company

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[Title of Commission and Cause Omitted]

ANSWER OF SIERRA PACIFIC POWER COMPANY TO MOTION OF PACIFIC GAS AND ELECTRIC COMPANY FOR REOPENING AND FURTHER HEARING

Sierra Pacific Power Company (hereinafter called "Sierra") opposes the motion of Pacific Gas and Electric Company (hereinafter called "PG&E") for reopening of this proceeding, for the following reasons:

1. The opinion and judgment of the Supreme Court herein place no obligation on the Commission to hold further hearings. The sole purpose and effect of the remand is to authorize the Commission to hold hearings for the purpose of determining the present lawfulness of the contract if the Commission deems such action desirable and in the public interest.

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2. The *Atlantic Coast Line* case* neither authorizes nor places a duty on the Commission either to hold further hearings or to make retroactive determinations to establish PG&E's "right" to retain moneys collected in excess of the contract rate.

3. It is incontrovertible on the record now before the Commission that the public interest is not and cannot be adversely affected by the contract. The sole purpose of PG&E's motion is to benefit its stockholders. There is no reason why the Commission should reopen the proceedings at this time, and the motion should be denied.

**Atlantic Coast Line R. Co. v. Florida,* 295 U.S. 301 (1935).

I

That neither the opinion of the Supreme Court of the United States issued herein on February 27, 1956, 76 S. Ct. 368, nor the judgment entered on June 1, 1956, constitutes a mandatory direction to the Commission to hold further hearings is apparent from the language used by the Court. After affirming the order of the Court of Appeals, both the opinion and judgment continue, with the words "with instructions to remand the case to the Federal Power Com- [2661] mission for such further // proceedings, not inconsistent with this opinion, as the Commission may deem desirable". When the Supreme Court intends to direct the Commission to hold further hearings it uses the words "with instructions to remand the cause to the Federal Power Commission for further proceedings consistent with this opinion." *Connecticut Co. v. Power Comm'n,* 324 U.S. 515, 536 (1945). To the same effect see also *First Iowa Coop. v. Power Comm'n,* 328 U.S. 152, 183 (1946). But that is very different from the language used by the Court here. It follows that, under the express language of the Supreme Court, the remand here is permissive only. The Commission is under no duty to reopen the proceedings unless it deems such action "desirable".

It is also apparent from the Supreme Court's opinion that the purpose of the remand is solely to authorize the Commission, if it finds such action desirable, to hold hearings to determine the status of the contract at the time of any such hearings, on the basis of the present record, and to determine reasonable rates to be thereafter observed if the Commission should hold the contract to be against the public interest.

Thus in the body of its opinion the Court pointed out that the power of the Commission "to prescribe a change in contract rates whenever it determines such rates to be

unlawful * * * is limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order * * *." 76 S. Ct. at p. 371. That this is the sole purpose of the remand is also apparent from the last paragraph of the Court's opinion:

> "Whether under the facts of this case the contract rate *is* [not *was*] so low as to have an adverse effect on the public interest is of course a question to be determined in the first instance by the Commission. We shall *therefore* affirm the order of the Court of Appeals, with instructions to remand the case to the Federal Power Commission for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable. It is so ordered." (Emphasis added) 76 S. Ct. at p. 372-373.

The order of June 17, 1954 having been declared invalid and set aside by the Supreme Court, the Commission has no power to correct or validate it *nunc pro tunc* by "amplifying and supplementing its findings" as requested by PG&E.*

PG&E apparently relies on the recent decision of the Supreme Court denying Sierra's motion to so amend its opinion as to establish Sierra's right to restitution, as giving some support to its contentions. We think it is plain from the words used by the Court in denying that motion,

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*As we shall see later, we do not question the right of the Commission to investigate the past history of the contract in any such hearing. We challenge only the contention that the Commission can make a retroactive "determination".

"without prejudice to the future determination of any issues that may arise as to the right of Sierra to restitution of

the excess payments made pursuant to the Commission's invalid order", that the majority denied the motion solely on the ground that that issue was not properly before the Court.* Accordingly, the Court did not pass on the merits. Moreover we think it is reasonably apparent from the fact that three of the Justices who joined in the unanimous opinion upholding Sierra's rights under the contract "would grant the motion", that if the majority had agreed that the question was properly before the Court and had passed on the merits, the motion would have been granted. It does not seem reasonable to suppose that, the Court having agreed unanimously that the contract was valid and binding, three Justices would disagree as to the consequences of that decision, without stating any grounds for such disagreement.

But in any event, the denial of that motion by the Supreme Court is no indication that the Court intended to require this Commission to hold further hearings, or that it authorized the Commission to make retroactive "determinations" as to the "reasonableness" of the contract. The denial of the motion has no bearing on PG&E's present motion before the Commission.

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*In order to remedy that defect, Sierra has commenced an action in the United States District Court for the Northern District of California, Southern Division, in which a demand for restitution is joined with an action for damages for breach of contract. A copy of the complaint in that action is annexed hereto as Exhibit A for the information of the Commission.

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II

PG&E, of course, is relying on the case of *Atlantic Coast Line R. Co. v. Florida, supra,* (*Atlantic*) which it has repeatedly cited in the course of this controversy. At the outset, it must be observed that that case furnishes no authority for the proposition that the Commission may fix rates retroactively. For in that very case the new order issued by the Interstate Commerce Commission after remand by the Supreme Court, although it set aside existing rates as discriminatory in substantially the same language as had been used in the earlier invalidated order and fixed the same rates which had been fixed in the earlier order, was "prospective only". 295 U.S. at 311.

Nevertheless, PG&E asks the Commission to reopen the proceedings and hold hearings for the purpose of "amplifying and supplementing" its "findings" made in its order of June 17, 1954, "and make the determinations necessary to establish the right of Pacific [PG&E] to collect and retain the rate of said Supplement No. 1 from and after June 17, 1954". In order to carry out this purpose, PG&E asks the Commission specifically to "make findings as to whether the [contract] rate * * * was on and prior to June 17, 1954, and thereafter, so low as to have an adverse effect

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upon the public // interest and whether the rate of said Supplement No. 1 was not in excess of a just and reasonable rate for the services rendered on and after June 17, 1954." Thus, in effect, PG&E is asking the Commission to make a retroactive determination that the contract was against the public interest in the past, and to determine the reasonable rates for that period. This the Commission has no power to do.*

We suggest that counsel is confusing the right to "restitution" with the right to a "refund" under § 205(e). There is no doubt that if the Commission, having duly set the contract aside, had then also held the increased rate to be unreasonable, it would have had the power under the express authority of § 205(e) to fix a new rate retroactively. But here we are not dealing with any question of "refund". As the Supreme Court itself pointed out in denying Sierra's motion to amend the opinion, we are dealing here with "the right of Sierra to *restitution* of the excess payments made pursuant to the Commission's invalid order" (emphasis added). The Commission, of course, has no power either to grant or withhold restitution, and what it may not do directly, it may not do indirectly. Restitution can be granted only by the Courts.

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To be sure, if the Commission should decide to hold further hearings in order to determine whether or not the contract is now against the public interest, it would have the power, in the normal course of the proceedings, to investigate the past history of the contract, and could make findings of fact on the basis of such investigation. But such findings would stand on an entirely different footing from the "determinations" that PG&E requests. Such findings would at most be findings of fact as to the cost of service, the rate of return, and the possible impact of the contract

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**Montana-Dakota Co. v. Public Service Co.*, 341 U.S. 246, 254-255 (1951). See also the dissenting opinion in the same case: "But this [§ 309] does not authorize the Commission to fix rates retrospectively. The Commission may establish rates only 'to be thereafter observed and in force.' " *Id.* at 260-261.

rates on other customers of PG&E. The Commission has no authority to draw conclusions from those facts retroactively and make a "determination" either that the rates have been against the public interest in the past or that they establish PG&E's "right" to retain the excess payments collected by it under the Commission's invalid order. For such "determinations" can have no bearing on anything the Commission has power to do. Moreover, as we have seen, the Supreme Court has, by the wording of the remand, carefully refrained from directing the Commission to make such findings.

PG&E, of course, is asking the Commission to make such findings in the hope that it might be able to induce a court of equity to draw conclusions therefrom similar to those drawn by the majority in *Atlantic,* and to refuse to order restitution on the authority of that case. No doubt it is conceivable, at least in theory, that on the basis of

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such // findings of fact as the Commission might make regarding the past history of the contract, a court of equity passing on a demand for restitution might determine that the equitable principles relied on by the Supreme Court in *Atlantic* should be applied here. But that would be a determination by a court, and not by the Commission. The existence of such a possibility neither gives PG&E a "right" to demand that the Commission now reopen the proceedings and make such determinations, nor imposes any duty on the Commission to do so.

This, we submit, is quite clear from Mr. Justice Cardozo's opinion, writing for the majority in the *Atlantic* case. That case holds that when a purchaser applies to a court of equity to compel a seller to make restitution of moneys collected under a technically invalid order, and the court finds that circumstances exist showing that it would be inequitable and against the public interest to compel restitution, a court of equity *may* "stand aloof" and refuse to take affirmative action in aid of the purchaser. But Mr. Justice Cardozo was very careful to point out that the Court was not holding that "the rates collected by the carrier [under the invalid order] were lawful * * * ." He continued: "Learning those things [i.e., the facts indicating that it would be inequitable to order restitution], it [the

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Court] *says no more // than this, that irrespective of legal rights and remedies* it will not intervene affirmatively, in the exercise of its equitable and discretionary powers, to change the *status quo.*" 295 U.S. at 315 (emphasis supplied). The "legal rights and remedies" of the parties are clearly spelled out by Mr. Justice Roberts, in his dissenting opinion:

> "If each of the shippers instead of asking restitution of the district court had instituted his separate action either in a Florida state court or, because of diversity of citizenship and the amount in controversy, in a federal district court, he need only have offered the Cummer Scale and the order of the Railroad Commission of Florida making it the lawful established tariff. This would have made a prima facie case for the recovery of all excess charged over the rates fixed by that scale. The defendant railroad company could not have offered the void decree of the Interstate Commerce Commission as an excuse for the overcharge. * * *" (295 U.S. at 325).*

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*We submit that there can be no doubt as to the correctness of Mr. Justice Roberts' statement of the law, which was not challenged by the majority, and it is in accordance therewith that we have commenced the action in the District Court, above referred to.

Nor does the *Atlantic* case establish any general principle under which, if the Commission should hereafter set the contract aside as against the public interest, PG&E could claim that it was entitled to retain the money collected by it in excess of the contract rates. On the contrary, as Mr. Justice Cardozo expressly pointed out, the *Atlantic* case was an "exception". The rule of "general application"

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is that // "what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal * * *". 295 U.S. at 309. Moreover, he justified the exception on the express ground that *"A situation so unique* [as that presented in the *Atlantic* case] is a summons to a court of equity to mould its plastic remedies in adaptation to the instant need." *Id.* at 316. (emphasis added). General principles are not established by unique exceptions.

That the *Atlantic* case is indeed a unique exception to the general rule is, we think, evident from the fact that we have found no other case where restitution has been denied when money was paid pursuant to a Commission order later held invalid, under a statute such as the Federal Power Act or the Interstate Commerce Act.* Nor can we conceive of any facts which could possibly be found either by the Commission or by a court so unique as to

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**United States v. Morgan*, 313 U.S. 409 (1941), on which PG&E has also placed reliance, is based upon an Act expressly construed by the Court as authorizing the Secretary of Agriculture "to determine a reasonable rate for the period antedating any order he may now make". 307 U.S. 183, 192 (1939). Thus the *Morgan* case is wholly irrelevant to the present controversy. All that the case holds is that under that statute money impounded by the Court pending a final determination of the proper rate by the Secretary should be held by the court until such final determination has been correctly made.

constitute "a summons to a court of equity to mould its plastic remedies" so as to enable PG&E to retain money obtained through what was so aptly and correctly described

by its own learned former counsel as its "double // dealing repudiation" of its own contract (Rec. pp. 1309-10). Equity does not favor those who repudiate their solemn obligations.

But in any event, that is an issue which, if raised at all, would have to be resolved by the courts, and not by this Commission. It follows that the *Atlantic* case has no bearing on the present motion other than that it has evidently given rise to PG&E's forlorn hope that if it could persuade this Commission to grant this motion and hold further hearings, and if in the course of such hearings it could persuade the Commission to find that the rate was now and for some time previously had been so low that a court could conclude that it had been against the public interest, it might then be able to persuade a court of equity to refuse to order PG&E to make restitution to Sierra. But any such findings by the Commission would be incidental to its inquiry into the present status of the contract. The only "determinations" which the Commission can make are (1) that the contract at present is or is not against the public interest and (2) if it finds that it is, what are the reasonable rates to be thereafter observed. The Commission is under no duty, and indeed is without power, to conduct an investigation for the purpose of making a "determination to establish" whether this case presents "a situation so unique" as to require a court of equity to make an exception to the general rule, which requires PG&E to make restitution. No such "determination" by the Commission is either necessary or proper. As presented in the

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motion papers, // the motion must be denied.

We assume, however, that PG&E's motion might be considered as an informal complaint, or request to the Commission, to exercise its discretion to reopen the proceeding on the ground that there is reason to believe that the contract is *now* against the public interest and that further proceedings might therefore be desirable. We shall therefore address ourselves to the question of whether there is anything either in the motion papers or elsewhere before the Commission to indicate that such action would be desirable.

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III

In its motion papers PG&E contends that "the record now contains evidence sufficient to support a finding by the Commission that said Rate Schedule F.P.C. No. 3 was so low as to have an adverse effect upon the public interest" and offers to present further evidence "showing that said rate was, prior to June 17, 1954, and ever since has been (1) so low as to impair the financial ability of PG&E to continue its service to Sierra; (2) so low as to cast upon other consumers an excessive burden; and (3) so low as to be unduly discriminatory." We respectfully submit that if such allegations were contained in a pleading presented in a court of law on the basis of the record now before the Commission, they would be dismissed as frivolous and sham.

That the contract rate does not and cannot "cast upon other consumers an excessive burden" is not only conclusively established by that record, but has been expressly found by this Commission in its Opinion No. 270 and accompanying order of June 17, 1954: In holding that a rate producing a return of only 4.75% is not unreasonable, the Commission found that "it affirmatively appears that this deficiency is not offset by any excess return from other sales subject to our jurisdiction and that the California Commission has ruled that such deficiencies may not be

offset by excesses // from other PG&E sales which are subject to its regulatory jurisdiction. This, and the fact that no undue discrimination or preference results from the deficiency, as we have already seen, makes clear that the proposed rate is not unreasonable and is lawful." FPC Op. No. 270, 7 PUR 3d 256, 269 (1954).

In support of this finding, the Commission cited the opinion of the Public Utilities Commission of California dated October 15, 1952, in which that Commission approved a general rate increase sought by PG&E, but refused to permit PG&E to repudiate its contracts with Sierra and certain intrastate wholesale customers with whom it had entered into special low rate contracts. The Commission conditioned its decision that the contracts should not be abrogated as follows:

> "The revenues from these [special contract] services will be computed at the new resale schedule for the purpose of determining applicant's over-all revenue requirements only, but the rates for such resale contract customers will not now be increased. By this method no burden will be placed on the other classes of customers but any burden will fall on the stockholders' portion of the earnings * * *." 96 PUR NS 493, 526 (1952).

The Commission will also recall the statements made by Commission Staff counsel both in oral argument and in his brief at the hearings which resulted in the issuance of the order of June 17, 1954. During the oral argument the following colloquy took place:

> "Mr. Wahrenbrock: Well, if PG&E is willing to serve one customer at less than a fair return on that business and to earn only a fair return on all of its other customers, it seems to me that the other customers are not the victims of an undue discrimination because they're getting all that the law entitles them to in any event. They're paying only a reasonable return on the business to them.
>
> "Commissioner Smith: Isn't that the situation here?
>
> "Mr. Wahrenbrock: That seems to me to be the situation that will result from the new rate here, yes.
>
> "Commissioner Smith: It seems to be the situation that has existed all along, as I understand the record.
>
> "Mr. Wahrenbrock: That is right." (Rec. pp. 1447-1448).

And again in his brief before the Commission, Commission Staff counsel said:

> "The only question would seem to be whether, in determining what is a fair return for this business, P.G.&E. should be held bound by the representations and agreement it made in 1948 as to a satisfactory return for the term of its agreement. Under the rate regulation practices heretofore followed by the California Commission and this Commission, no other customer of P.G.&E. will bear any greater burden if P.G.&E. is held to its 1948 representations and the California Commission has held that it should be." (Brief for Commission's Staff pp. 33-34.)

In the face of such a record we are at a loss to understand how counsel for PG&E can now assert that he desires to present further evidence to show that the rate was and ever since June 17, 1954 has been either "so low as to cast upon other customers an excessive burden" or that

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it is "so low as to be unduly discriminatory." Those // issues have already been decided against PG&E by this Commission on this record.

Nor do we understand PG&E's offer to present evidence to show that the rate is and since prior to June 17, 1954 has been "so low as to impair the financial ability of PG&E to continue its service to Sierra." The Commission has in its files the "Annual Reports" issued by PG&E to its stockholders. Annexed hereto as Exhibit B is a copy of a Prospectus issued by PG&E on June 12, 1956, four days after the filing of the present motion, in connection with an issue of rights to its stockholders to purchase 812,791 shares of Common Stock at a price of $45 per share or for an aggregate sum of approximately $36,000,000. As appears from the Summary of Earnings on page 6 of that Prospectus, as well as from the said Annual Reports, the gross operating revenues of PG&E have increased steadily from $279,498,730 in 1951 to $453,841,248 for the twelve months ended March 31, 1956. During the same period the net income has increased from $36,876,245 to $72,439,628, the earned surplus from $48,603,899 to $105,853,828 (see Ex. B, p. 26), and the earnings per share from $2.14 in 1951 to $3.39.

Concededly, the amount now due Sierra in order to repay the amounts collected in excess of the contract rates since

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June 16, 1954, is $889,908.23, or approximately // 8/10ths of one per cent. of the total earned surplus of $105,853,828. This is the amount which PG&E now asserts would adversely affect its financial ability to continue its utility services, if it were compelled to repay it to Sierra.

More important, it is also apparent from the balance sheet set forth on pages 24 and 25 of the Prospectus, as well as from the Statement of Surplus on page 26, that the only effect of permitting PG&E to keep these overpayments would be to transfer the amounts so collected from a "contingent liability" to "earned surplus"—i.e., the sole beneficiaries of such a result would be PG&E's stockholders. The balance sheet carries the overpayments as a "Reserve * * * For contingent electric rate refund," and the Statement of Surplus on page 26 shows them as a "Deduction from Earned Surplus". If not deducted, the amount will of course be added to "earned surplus", and be available for distribution as dividends to PG&E's stockholders.

Finally, that PG&E itself considers that the possibility of sustaining such losses of revenue for the next fifteen years can have no material effect on its financial position would seem to be incontrovertibly established by the following statement under the heading "Note 8—Commitments and Contingent Liabilities" on page 29 of the Prospectus:*

> "Except as to matters involved in litigation which is considered routine to the Company's operations and certain indemnities given in the normal course of business, there are no known contingent liabilities not provided for by reserves or insurance."

The Commission of course is aware that the Securities and Exchange Commission requires any corporation issuing stock to "Briefly describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business * * *." (SEC Form S-1, Item 12). We quite agree that PG&E was correct in describing litigation involving a possible gain or loss of half a million dollars a year, or approximately 1/10th of one per cent. of PG&E's gross operating revenues and 7/10ths of one per cent. of its net income for the year 1955, as "litigation which is considered routine to the Company's operations". But we find it difficult to understand how PG&E can at the very same time solemnly contend before this Commission that the loss of that litigation would "impair the financial ability of PG&E to continue its service to Sierra"—and ask the Commission to reopen the proceedings so as to permit it to produce evidence to prove it. If PG&E could succeed in such an endeavor, its position in relation to the $36,000,000 stock issue would be jeopardized indeed. But of course the contention is frivolous, and the Prospectus correct.

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*The identical provision appears in the Annual Reports for 1953, 1954 and 1955, during which years the binding effect of the contract was in litigation.

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We respectfully submit that it is an insult to the intelligence of this Commission for PG&E to contend on such a record that it is desirable for the Commission to take up the time of its already over-burdened staff in order to enable PG&E to introduce evidence to prove that this contract is against the public interest. The contract has been the subject of hearings and arguments before the Commission and litigation before the Courts for over three years. The record made at the original hearings before the Commission contains over 2,600 pages. The answers to the issues PG&E now seeks to raise are already contained in that record and we respectfully submit that the dissenting Commissioners in Opinion No. 270 were correct when, after reviewing that record and applying the very standards which have now been announced as correct by the Supreme Court of the United States, they concluded that the contract was not against the public interest.* All that PG&E could possibly show in any hearing that the Commission might hold is that the contract is unprofitable to its stockholders. As the Supreme Court very clearly pointed out:

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> "That the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed 'is necessary in the public interest.' When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility." 76 S. Ct. at p. 372.

We submit that on this record it is perfectly apparent that the public interest will not be served by reopening the proceedings for the purpose of aiding PG&E to retain money collected by it in violation of its contract, for the sole benefit of the very stockholders on whose behalf the contract was originally entered into.

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CONCLUSION

As it has throughout this litigation, PG&E persists in ignoring the underlying fact that this controversy had its origin in PG&E's own repudiation of its solemn contractual obligations. PG&E also appears to remain unreconciled to the Supreme Court's decision that a contract for the sale of electric energy subject to the Federal Power Commission's jurisdiction is just as binding, as between the parties to the contract, as any other contract. It still seems to believe that somehow it is entitled to what it considers to be a "fair return" on its sales to Sierra, despite its solemn agreement, entered into after over a year of negotiations and for the purpose of meeting the threat of competition from public power, to accept a lower return for the duration of the contract.

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*We should like to point out that the dissenting Commissioners' opinion in this respect was not challenged by the majority, who considered only the "fairness" of the rate of return to PG&E, without regard to the existence of the contract.

It is plain that the public interest is not and cannot, under any presently foreseeable circumstances, be adversely affected by the contract. Under these circumstances, we respectfully submit that the two Commissioners who dissented from the Commission's order of June 17, 1954, and whose position has now been vindicated by the unanimous decisions of the Court of Appeals for the District of Columbia Circuit and the Supreme Court of the United States, were entirely correct when they said:

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> "In vernacular terms, PG&E—like Sierra in respect of the undisturbed 15-year term of the contract and its restrictive covenant regarding the power supply—having made its bed, should be required to lie in it—absent some showing of harm to the public interest if this axiom were followed." (Rec. p. 2614)

Wherefore, PG&E's motion should be denied.

Respectfully submitted,
Winthrop, Stimson, Putnam & Roberts
Attorneys for
Sierra Pacific Power Company
Office and P. O. Address
40 Wall Street
New York 5, N. Y.

William C. Chanler
J. Philip Bahn
Of Counsel

Dated: June 26, 1956

[2683]*

Exhibit A

In the United States District Court for the Northern District of California, Southern Division.

Sierra Pacific Power Company, *Plaintiff,* v. Pacific Gas and Electric Company, *Defendant.*	Civil No. 35591

Original Filed Jun 18 1956 Clerk, U. S. Dist. Court San Francisco

COMPLAINT

Plaintiff above named, complaining of the defendant, alleges as follows:

Count I

1. Plaintiff is a corporation incorporated under the laws of the State of Maine, and defendant is a corporation incorporated under the laws of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

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2. Plaintiff is a public utility under the laws of the States of Nevada and California and is engaged in the business of generating, transmitting and distributing electricity to consumers in northwestern and central Nevada

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[*For opinion of the District Court staying proceedings in this action, see Exhibit A to Petitioner's Memorandum in Answer to Intervener's Reply Memorandum on Motion to Dismiss filed before the Court of Appeals for the Ninth Circuit, January 13, 1958. (Pacific's reply appears at Supp. App. R. 2792-2809)] and eastern California, and defendant is a public utility under the laws of the State of California and under the provisions of Part II of the Federal Power Act (§ 213 of the Act of August 26, 1935, c. 687, 49 Stat. 847, 16 U.S.C.A. §§ 824-824h) and is engaged in the business of generating, transmitting and distributing electricity primarily in north central California.

3. On or about March 4, 1948, defendant entered into a contract with plaintiff, a true copy of which is hereto annexed, marked Exhibit A, and made a part hereof, pursuant to which defendant agreed among other things to sell and deliver to plaintiff all of the electric energy required by it for distribution to its customers in Nevada and California, except such as may be produced by Plaintiff's then existing facilities and certain other minor exceptions, at rates fixed by a certain schedule contained in said contract, until December 31, 1964.

4. Plaintiff has duly performed all the conditions of said contract on its part to be performed.

5. As required by its terms, said contract was duly approved by the Public Utilities Commission of the State

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of California by an order of the said Commission // dated April 27, 1948, authorizing plaintiff and defendant to "deliver and charge for on the one hand and receive and pay for on the other, electric energy at the rates and under the conditions provided in said contract."

6. On or about September 7, 1953 defendant breached said contract by failing and refusing to sell and deliver electric energy to plaintiff at the rates provided therein.

7. By reason of the foregoing, plaintiff has sustained damages in the sum of $1,226,729.76, no part of which has been paid except the sum of $336,821.53.

Count II

8. Plaintiff repeats and realleges as part of this count each and every allegation contained in paragraphs 1, 2, 3, 4 and 5 of this complaint with like effect as if herein fully realleged.

9. The said contract was duly filed with the Federal Power Commission on or about June 7, 1948, and has been and is now on file with the said Commission as defendant's Rate Schedule FPC No. 3.

10. Said contract contains a covenant of good faith and fair dealing, which covenant is implied in fact and in law, that defendant will not voluntarily take any action either for the purpose or with the effect of destroying or injuring the rights of plaintiff to receive the benefits and fruits of the contract.

11. On or about February 2, 1953 defendant breached [2686] the said covenant of good faith and fair dealing by voluntarily filing with the said Federal Power Commission, unlawfully and without plaintiff's consent, a new schedule of rates substantially higher than the rates stipulated in the contract. Said new schedule, designated as Supplement No. 1 to the said Rate Schedule FPC No. 3, provided by its terms that it was to be applicable to service to plaintiff under the conditions set forth in the contract and that "Said contract shall remain in full force and effect except as to section 4 thereof, which section shall be superseded in its entirety by the provisions of this rate schedule."

13. The intent, purpose and effect of said filing was to procure certain orders of the Federal Power Commission respectively issued by said Commission on March 13, 1953, September 28, 1953 and June 17, 1954, pursuant to which

plaintiff was required to make payments to defendant at the schedule of increased rates set forth in said Supplement No. 1 rather than at the rates stipulated in said contract for the period from September 6, 1953 to on or about February 1, 1956. On February 27, 1956 the said filing and the said orders were held invalid by the Supreme Court of the United States.

14. By reason of the foregoing, plaintiff has sustained damages in the sum of $1,226,729.76, no part of which has been paid except the sum of $336,821.53.

Count III

[2687]

15. Plaintiff repeats and realleges as part of // this count each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 9 and 10 of this complaint with like effect as if herein fully realleged.

16. On or about February 2, 1953 defendant, without plaintiff's consent, filed with the said Federal Power Commission a new schedule of rates substantially higher than the rates stipulated in said contract, and designated as Supplement No. 1 to defendant's Rate Schedule FPC No. 3.

17. On or about March 13, 1953 the Federal Power Commission issued an order suspending the effective date of said Supplement No. 1 until September 6, 1953, and ordered a hearing as to the reasonableness thereof.

18. On or about March 13, 1953 plaintiff filed a petition with the said Commission, and on or about March 23, 1953 plaintiff filed an amended petition, requesting the Commission to reject the filing by defendant of said Supplement No. 1 on the ground that, by such filing, defendant could not unilaterally change its contract with plaintiff.

19. On or about April 17, 1953 the said Commission issued an order denying plaintiff's petitions.

20. Pursuant to the Commission's order of March 13, 1953, and a further order issued by it on September 28, 1953, the rates set forth in Supplement No. 1 became effective as of September 6, 1953, and remained the effective

rates pending further hearing and determination // by the Commission as to their lawfulness.

21. After hearings and argument before the Commission, it issued an order on June 17, 1954 rejecting plaintiff's contention that the contract rates could not be unilaterally increased by the filing of Supplement No. 1, and holding the rates prescribed in said Supplement to be lawful.

22. Thereafter plaintiff duly filed its petition for review of the said order of June 17, 1954 with the United States Court of Appeals for the District of Columbia Circuit, and on February 24, 1955 that Court held that the contract rates could not be increased by the unilateral filing of a schedule of higher rates without plaintiff's consent and set aside the order under review.

23. On February 27, 1956, the Supreme Court of the United States in an opinion, a copy of which is annexed hereto as Exhibit B, held that neither the filing of Supplement No. 1 nor the Commission's order was effective to change the contract rates and affirmed the judgment of the Court of Appeals setting aside the Commission's order of June 17, 1954.

24. Between the 6th day of September, 1953, and the 1st day of February, 1956, under compulsion of the said invalid orders of the Federal Power Commission, defendant has paid plaintiff for electric energy delivered to it an

aggregate amount of $1,226,729.76 in excess of the rates
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stipulated in said contract.

25. On or about the 26th day of March, 1956, plaintiff duly demanded of defendant that it repay plaintiff the said sum of $1,226,729.76 with interest, but said defendant refused and still fails and refuses to pay any part thereof except the sum of $336,821.53, which sum is the amount paid in excess of the contract rates between the 6th day of September, 1953 and the 16th day of June, 1954, and was repaid together with interest thereon on March 30, 1956.

Wherefore, plaintiff demands judgment against defendant in the sum of $889,908.23 together with interest at seven per cent. per annum on $20,694.22 thereof from the 23rd day of July, 1954 and on $41,011.47 thereof from the 19th day of August, 1954 and on $44,561.04 thereof from the 24th day of September, 1954 and on $41,908.64 thereof from the 22nd day of October, 1954 and on $41,153.13 thereof from the 17th day of November, 1954 and on $43,291.91 thereof from the 20th day of December, 1954 and on $46,680.32 thereof from the 25th day of January, 1955 and on $47,798.75 thereof from the 25th day of February, 1955 and on $43,397.18 thereof from the 18th day of March, 1955 and on $44,398.95 thereof from the 22nd day of April, 1955 and on $40,502.16 thereof from the 25th day of May, 1955 and on $41,224.87 thereof from the 24th day of June, 1955
[2690]
and on $42,700.28 // thereof from the 27th day of July, 1955 and on $45,231.47 thereof from the 26th day of August, 1955 and on $51,602.75 thereof from the 21st day of September, 1955 and on $47,323.39 thereof from the 19th day of October, 1955 and on $48,933.53 thereof from the 25th

day of November, 1955 and on $51,005.49 thereof from the 28th day of December, 1955 and on $53,589.87 thereof from the 18th day of January, 1956 and on $55,342.84 thereof from the 24th day of February, 1956, together with the costs of this action.

WILLIAM C. CHANLER
William C. Chanler

WINTHROP, STIMSON, PUTNAM & ROBERTS
Winthrop, Stimson, Putnam & Roberts

GREGORY A. HARRISON
Gregory A. Harrison

BROBECK, PHLEGER & HARRISON
Brobeck, Phleger & Harrison

* * * * * * *

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PROSPECTUS

EXHIBIT B

812,791 Shares

Pacific Gas and Electric Company

Common Stock

Par Value $25 per share

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The 812,791 shares of common stock are hereby offered pro rata by the Company for subscription, to the holders of record of its common stock at the close of business on June 12, 1956, in the ratio of one share for each twenty shares then held. Subscription Rights must be exercised on or before July 2, 1956, after which they will be void. The shares offered hereby will not participate in the dividend of 60¢ per share to be paid on or about July 12, 1956, to holders of record on June 12, 1956.

SUBSCRIPTION PRICE $45.00 PER SHARE

	Subscription Price	Underwriting Discounts and Commissions(1)		Proceeds to Company(1)(2)	
		Maximum	Minimum	Maximum	Minimum
Total	**$36,575,595.00**	**$585,116.40**	**$325,116.40**	**$36,250,478.60**	**$35,990,478.60**
Per Unit	**$45.00**	**$0.72**	**$0.40**	**$44.60**	**$44.28**

(1) Upon the terms and subject to the conditions of the Underwriting Agreement herein referred to, the Underwriters named herein have agreed to purchase from the Company at the subscription price per share set forth above, any unsubscribed shares of common stock offered hereby; and in case any unsubscribed shares are sold by the Underwriters prior to the close of business on July 24, 1956, at an average gross price in excess of the subscription price per share, the Underwriters have agreed, in addition, to pay to the Company 65 percent of such excess. The Company has agreed to pay the Underwriters 40¢ a share as to all the 812,791 shares plus an additional 80¢ for each share, up to a maximum of 325,000 shares (or such greater number as may be designated by the Company prior to the close of business on July 2, 1956), acquired by them for their own accounts through the exercise of Subscription Warrants. The minimum and maximum underwriting commissions are based upon the respective assumptions that the Underwriters will subscribe for (a) none of the shares and (b) 325,000 or more of the shares. The Underwriting Agreement contains reciprocal covenants of indemnity against liability in certain instances.

(2) Before deducting other expenses of the Company estimated at $248,000.

Prior to the expiration of the Subscription Warrants, the Underwriters may offer Common Stock, including Common Stock acquired or to be acquired by them through the exercise of Subscription Warrants, on a when-issued basis or otherwise, at prices which will not be increased more often than once in any one business day, and will not be more than the greater of the last sale or current offering price on the New York Stock Exchange, plus the regular brokerage commission on such exchange, nor less than the subscription price minus the dealer concession, if any. After the expiration of the Subscription Warrants, the Underwriters may make public or private offerings of the Common Stock. As a result they may realize profits or losses independent of the underwriting commissions stated above. If any such public offering is made at a price different from those stated in this paragraph, this Prospectus will be appropriately amended or supplemented. The last reported sale price of the Common Stock on the New York Stock Exchange on June 11, 1956 (ex dividend trading) was $50.125, and the price range from April 1, 1956 through June 11, 1956 was $53.75 high and $49.625 low.

A complete list of the Underwriters is set forth herein under the caption "Underwriting"

Blyth & Co., Inc.

Dated June 12, 1956

* * * * * * *

SUMMARY OF EARNINGS

The following summary of earnings for the five years ended December 31, 1955, has been examined by Haskins & Sells, independent public accountants, whose opinion with reference thereto is included elsewhere herein. The summary should be read in conjunction with the other financial statements of the Company included in this Prospectus. Earnings for the twelve months ended March 31, 1956, are based upon the regular monthly income statements of the Company, and such earnings have not been audited or certified by independent public accountants.

	Year Ended December 31,					Twelve Months Ended March 31, 1956, Unaudited
	1951	1952	1953	1954	1955	
Gross Operating Revenues:						
Electric department	$189,364,571	$205,643,601	$252,663,806	$265,418,676	$289,709,964	$295,640,474
Gas department	88,633,890	106,780,977	109,732,200	118,846,560	151,508,156	155,897,539
Other departments	1,500,269	1,560,705	1,709,464	1,978,956	2,281,435	2,303,235
Total gross operating revenues	$279,498,730	$313,985,283	$364,105,470	$386,244,192	$443,499,555	$453,841,248
Operating Expenses:						
Maintenance and repairs	$ 13,674,312	$ 16,786,822	$ 17,057,327	$ 15,063,191	$ 13,220,482	$ 13,375,817
Production expenses:						
Purchased power	10,974,876	10,166,451	7,010,866	6,377,050	2,917,500	4,259,009
Natural gas, oil, and other fuels:						
Gas department	43,147,863	46,546,120	53,364,646	58,494,108	72,306,957	76,359,012
Electric and other departments	17,967,188	16,907,900	23,106,894	23,928,584	34,862,291	31,814,617
Other	7,687,603	8,083,882	8,533,766	8,463,994	8,878,963	9,327,796
Transmission expenses	3,006,936	3,777,557	4,210,733	4,214,983	4,285,929	4,299,134
Distribution expenses	14,654,200	16,500,187	17,772,310	18,231,693	18,768,896	18,820,798
Customers' accounting and collecting expenses	11,027,834	12,263,416	13,039,346	13,688,354	14,865,406	14,997,883
Sales promotion expenses	2,368,009	2,485,572	2,694,957	2,973,051	3,340,303	3,402,784
Provision for depreciation and amortization①	31,609,982	32,699,648	35,172,465	39,090,308	43,372,342	44,110,305
Taxes (excluding Federal income tax)	35,133,583	34,376,179	38,767,195	45,512,679	49,806,596	50,689,227
Federal income tax③	25,363,884	38,947,926②	52,541,593②	50,289,329②	64,671,843②	67,796,849②
Administrative and general expenses	9,781,542	10,712,427	12,754,800	15,539,157	15,809,518	16,411,583
Provision for doubtful accounts	360,000	420,000	810,000	940,000	960,000	960,000
Provision for casualty losses from storm damage	—	—	—	—	1,738,200	1,738,200
Total operating expenses	$226,757,812	$250,674,087	$286,836,898	$302,806,481	$349,805,226	$358,363,014
Net Operating Revenues	$ 52,740,918	$ 63,311,196	$ 77,268,572	$ 83,437,711	$ 93,694,329	$ 95,478,234
Miscellaneous Income:						
Dividends from subsidiaries	$ 47,025	$ 17,100	$ 17,100	$ 915,483④	$ 729,650④	$ 721,650④
Other	317,518	411,545	190,534	119,570	74,459	124,839
Total	$ 364,543	$ 428,645	$ 207,634	$ 1,035,053	$ 804,109	$ 846,489
Gross Income	$ 53,105,461	$ 63,739,841	$ 77,476,206	$ 84,472,764	$ 94,498,438	$ 96,324,723
Income Deductions:						
Interest on funded debt	$ 18,621,512	$ 19,463,499	$ 21,145,536	$ 23,645,828	$ 24,462,946	$ 24,726,220
Amortization of net bond discount and expense	412,319	386,918	375,648	420,053	417,310	416,033
Miscellaneous interest	54,919	144,840	539,530	514,328	1,001,561	964,092
Interest charged to construction	3,408,312*	3,764,151*	4,863,642*	5,656,119*	3,676,852*	3,334,860*
Special charge equivalent to reduction in Federal income and State franchise taxes (resulting from redemption of bonds)	—	—	—	1,887,672	69,699	
Other income deductions	548,778	508,485	585,739	621,853	1,188,960	1,113,610
Total	$ 16,229,216	$ 16,739,591	$ 17,782,811	$ 21,433,615	$ 23,463,624	$ 23,885,095
Net Income	$ 36,876,245	$ 47,000,250	$ 59,693,395	$ 63,039,149	$ 71,034,814	$ 72,439,628
Dividends on Preferred Stock of the Company	13,382,782	15,530,152	15,721,818	16,266,235	17,102,301	17,374,812
Balance of Net Income After Preferred Dividends	$ 23,493,463	$ 31,470,098	$ 43,971,577	$ 46,772,914	$ 53,932,513	$ 55,064,816
Common Stock: Average shares outstanding	11,001,529	12,492,070	14,114,427	16,160,533	16,255,733	16,255,733
Earnings per share	$2.14	$2.52	$3.12	$2.89	$3.32	$3.39
Dividends declared per share	$2.00	$2.00	$2.10	$2.20	$2.20	$2.25

*Denotes red figures.

The "Notes to Financial Statements" and the notes on the following page are integral parts of this Summary of Earnings.

* * * * * * *

[2714]

PACIFIC GAS AND ELECTRIC COMPANY

BALANCE SHEET, DECEMBER 31, 1955

Assets

UTILITY PLANT (Note 2):		
Tangible plant:		
Plant in service:		
Electric department	$1,534,380,365	
Gas department	420,889,408	
Other departments	17,163,611	
Common utility plant	67,375,187	
Total tangible plant in service	$2,039,808,571	
Construction work in progress	108,625,138	
Plant held for future use	22,495	
Total tangible plant	$2,148,456,204	
Intangible plant	1,265,238	
Plant acquisition adjustments	15,544,051	
Total utility plant	$2,165,265,493	
Less reserves for depreciation and amortization (Note 3)	411,934,726	
Utility plant—net		$1,753,330,767
INVESTMENTS AND NON-CURRENT RECEIVABLES:		
Capital stock of subsidiaries—at cost (Notes 1 and 5)	$ 15,953,928	
Investment in other physical property—at cost	4,244,585	
Other investments and non-current receivables	1,865,821	
Total investments and non-current receivables		22,064,334
CURRENT ASSETS:		
Cash	$ 26,498,828	
Miscellaneous special deposits	$ 437,314	
Accounts receivable:		
Customers	$ 33,147,967	
Others	1,259,698	
Total	$ 34,407,665	
Less reserve for doubtful accounts	1,635,973	
Remainder	$ 32,771,692	
Materials and supplies (for operations and construction)—at average cost	$ 14,911,602	
Total current assets		74,619,436
DEFERRED CHARGES:		
Unamortized bond discount and expense (Note 5)	$ 10,505,220	
Other (Note 6)	3,667,768	
Total deferred charges		14,172,988
TOTAL		$1,864,187,525

The accompanying Notes to Financial Statements are an integral part of this statement.

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PACIFIC GAS AND ELECTRIC COMPANY

BALANCE SHEET, DECEMBER 31, 1955

Liabilities

CAPITALIZATION:		
Capital stock and surplus:		
Capital stock (Note 4):		
First preferred—Authorized, 20,000,000 shares of $25 par value; issued and outstanding, 13,882,565 shares	$ 347,064,125	
Common—Authorized, 20,000,000 shares of $25 par value; issued and outstanding, 16,255,811 shares	406,395,275	
Excess of premiums received over discount and expense on outstanding shares	48,962,647	
Instalments received on employees' preferred stock purchase agreements	1,802,210	
Total capital stock		$ 804,224,257
Surplus, per statement of surplus:		
Capital surplus	$ 627,217	
Earned surplus (including restricted surplus of $9,424,029—Note 6)	105,853,828	
Total surplus		106,481,045
Total capital stock and surplus		$ 910,705,302
Mortgage bonds (Note 5):		
Issued	$ 813,268,000	
Less in treasury	3,200,000	
Mortgage bonds held by public	$ 810,068,000	
Less sinking-fund requirements	4,932,680	
Remainder—mortgage bonds (less sinking-fund requirements)		805,135,320
Total capitalization		$1,715,840,622
CURRENT LIABILITIES:		
Bank loans	$ 18,000,000	
Accounts payable	17,802,822	
Drafts outstanding	1,439,466	
Dividends payable	8,947,117	
Current sinking-fund requirements (Note 5)	4,932,680	
Accrued interest	2,362,922	
Customers' meter and line deposits	5,360,449	
Accrued taxes for current and prior years (Note 6)	75,922,959	
Total current liabilities		134,768,415
DEFERRED CREDITS:		
Unamortized premium on bonds (Note 5)	$ 1,794,187	
Other	1,237	
Total deferred credits		1,795,424
RESERVES:		
For insurance and casualties	$ 1,946,558	
For contingent electric rate refund	1,117,807	
Total reserves		3,064,365
CONTRIBUTIONS IN AID OF CONSTRUCTION		8,718,699
COMMITMENTS AND CONTINGENT LIABILITIES (Note 8)		
TOTAL		$1,864,187,525

The accompanying Notes to Financial Statements are an integral part of this statement.

PACIFIC GAS AND ELECTRIC COMPANY

STATEMENT OF SURPLUS

For the Five Years Ended December 31, 1955

	Year Ended December 31				
	1951	1952	1953	1954	1955
Capital Surplus—Balance at beginning and end of year (unchanged)	$ 627,217	$ 627,217	$ 627,217	$ 627,217	$ 627,217
Earned Surplus:					
Balance at beginning of year	$47,202,061	$48,603,899	$ 55,078,028	$ 69,524,694	$ 81,711,345
Net income, from summary of earnings	36,876,245	47,000,250	59,693,395	63,039,149	71,034,814
Other additions to earned surplus:					
Additions to restricted surplus for income taxes payable following period of accelerated amortization (Note 6)		47,125	470,870	2,617,625	6,288,409
Miscellaneous—net (includes $459,668 profit on sale of properties in 1955)	1,363	3,206	9,966*	75,470*	511,048
Total	$84,079,669	$95,654,480	$115,232,327	$135,105,998	$159,545,616
Deductions from earned surplus, other than dividends:					
Adjustment of past service pension fund (Note 7)				$ 1,000,000	
Cost of preliminary surveys on projects abandoned (less related Federal income tax credit, $210,126)			$ 193,963		
Provision for contingent electric rate refund			94,625	472,383	$ 550,799
Purchase premium on bonds reacquired, plus unamortized net discount and expense applicable thereto	$ 89,930	$ 62,160	8,259	102,863	276,075
Total	$ 89,930	$ 62,160	$ 296,847	$ 1,575,246	$ 826,874
Dividends on capital stocks—Cash:					
First preferred, cumulative:					
6%—$1.50 per share per annum	$ 6,317,593	$ 6,317,592	$ 6,317,590	$ 6,317,589	$ 6,317,616
5½%—$1.37½ per share per annum	1,613,225	1,613,222	1,613,221	1,613,218	1,613,207
5%—$1.25 per share per annum	3,651,964	5,799,338	5,991,007	6,149,988	6,225,603
4.80%—$1.20 per share per annum	1,800,000	1,800,000	1,800,000	1,810,425	1,820,850
4.50%—$1.12½ per share per annum				375,015	1,125,025
Common—$2.00 per share per annum through June 1953, and $2.20 per share per annum thereafter	22,003,058	24,984,140	29,688,968	35,553,172	35,762,613
Total	$35,385,840	$40,514,292	$ 45,410,786	$ 51,819,407	$ 52,864,914
Total deductions from earned surplus	$35,475,770	$40,576,452	$ 45,707,633	$ 53,394,653	$ 53,691,788
Balance at end of year (restricted for income taxes payable following period of accelerated amortization: 1952, $47,125; 1953, $517,995; 1954, $3,135,620; 1955, $9,424,029) (Note 6)	$48,603,899	$55,078,028	$ 69,524,694	$ 81,711,345	$105,853,828
Total Surplus	$49,231,116	$55,705,245	$ 70,151,911	$ 82,338,562	$106,481,045

*Denotes red figure.

The accompanying Notes to Financial Statements are an integral part of this statement.

* * * * * * *

NOTES TO FINANCIAL STATEMENTS (Continued)

NOTE 5—Mortgage Bonds, and Related Sinking Funds, Discount and Expense, and Premiums:

The Company's outstanding first and refunding mortgage bonds in the principal amount of $810,068,000 were issued in series, bear annual interest rates from 2¾% to 3½%, and mature variously from June 1, 1966 to December 1, 1987.

Under the terms of the first and refunding mortgage, the Company is required to make semi-annual sinking-fund payments based upon the aggregate bonded indebtedness outstanding; such sinking-fund payments during the year ending December 31, 1956 will amount to approximately $8,133,000 as to bonded indebtedness outstanding at December 31, 1955 subject to reduction, in effect, by such amounts as may be received through sale to the sinking-fund Trustee of the treasury bonds held by the Company at December 31, 1955 in the principal amount of $3,200,000; the net of these amounts, $4,933,000 is shown among the current liabilities in the accompanying balance sheet. As to the bonds outstanding at December 31, 1955 the sinking-fund requirements for the ensuing five years will be progressively somewhat, but not materially, less than those for the year ending December 31, 1956.

All fixed properties and certain personal property of the Company are subject to the lien of the mortgage bonds. In addition, the capital stocks of subsidiaries are on deposit and pledged with the California trustee of the first and refunding mortgage.

In general, bond discount and expense, redemption premiums on refunded issues, and sale premiums are being written off over the lives of the various issues to which they pertain, or refunding issues, and such items applicable to bonds reacquired other than through refunding operations are cleared to earned surplus at time of reacquisition.

NOTE 6—Federal Income Tax:

In June 1953 final agreement was reached with the Internal Revenue Service on Federal income tax liability for the years 1946 to 1951, inclusive. Adjustments in allowable depreciation for those years gave rise to additional assessments of Federal income and State franchise taxes, of which the unamortized balance of $1,034,082 is included in other deferred charges at December 31, 1955. This balance is to be amortized by charges to income over the period from January 1, 1956 to December 31, 1957 as authorized by the Public Utilities Commission of the State of California.

The cost of plant construction completed under Certificates of Necessity is being amortized on a five-year basis for income tax purposes, whereas for general accounting purposes such cost is being depreciated at normal rates. Because the benefits produced by the deferral of taxes are temporary, the Company has offset the effect on income by recording in its accounts provisions for deferred income taxes and an earned surplus account restricted for income taxes payable following the period of accelerated amortization. The deferred tax in the amount of $517,995 which was accumulated in the accrued tax account prior to 1954 has been reclassified as restricted surplus.

NOTE 7—Pension and Retirement Plan:

The description of the Company's retirement and pension plans included in this Prospectus under the caption "Employee Relations" is incorporated herein by reference.

NOTE 8—Commitments and Contingent Liabilities:

At December 31, 1955 the Company had firm commitments in the aggregate amount of about $69,306,000 in connection with its plant construction program.

The Company closes its accounts promptly as of the end of each month, with the result that there are always unrecorded items of expense from month to month and year to year; at December 31, 1955 the unrecorded liabilities and accruals for expenses were more than offset by the unrecorded and unbilled revenues accrued at that date.

Except as to matters involved in litigation which is considered routine to the Company's operations and certain indemnities given in the normal course of business, there are no known contingent liabilities not provided for by reserves or insurance.

NOTE 9—Earnings and Supplementary Profit and Loss Information:

The Company had no management or service contract fees, and paid no royalties; miscellaneous rent expenses are not of substantial amount and are included under the various primary operating account classifications.

Information relating to maintenance and repairs and to depreciation and amortization is included in the summary of earnings and in Note 3. Information as to taxes other than Federal income tax is as follows:

* * * * * * *

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[Title of Commission and Cause Omitted]

SUPPLEMENTAL ANSWER OF SIERRA PACIFIC POWER COMPANY TO MOTION OF PACIFIC GAS AND ELECTRIC COMPANY FOR REOPENING AND FURTHER HEARING

Sierra Pacific Power Company ("Sierra") respectfully submits this supplement to its answer dated the 26th day of June, 1956, for the purpose of bringing to the attention of the Commission certain statements sworn to by the President of Pacific Gas and Electric Company ("PG&E") before the Public Utilities Commission of the State of California, which directly contradict and refute the allegations made by PG&E before this Commission in its pending motion for reopening and further bearing. The said statements were only brought to counsel's attention within the last few days, but because of their nature and their direct bearing on PG&E's pending motion, counsel believes that it is essential that they be called to the Commission's attention.

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1. The Commission will recall that it appears on // the record in this proceeding that at the time the contract between PG&E and Sierra was entered into in 1948, or shortly thereafter, PG&E entered into five-year contracts with the City of Alameda and certain other cities in the State of California, including the cities of Lompoc, Ukiah, Palo Alto, Lodi, Santa Clara, Healdsburg, Biggs and Gridley, to sell electric energy at substantially the same rate as that provided for in the said contract between PG&E and Sierra (Ex. 17, Rec. pp. 1749-1795).

2. As appears from an application filed with the Public Utilities Commission of the State of California by PG&E on December 19, 1955, a copy of which is annexed hereto as Exhibit A and made a part hereof, and from the Opinion and Order entered thereon by the said State Commission on the 14th day of February, 1956, a copy of which is annexed hereto as Exhibit B and made a part hereof, at some time prior to October 13, 1955, and shortly before the said five-year contracts were to expire, PG&E undertook to negotiate new contracts with the said cities. As further appears from said application, all of said new contracts were negotiated on terms and providing for rates substantially similar to the contract with the City of Alameda, which is the subject matter of the particular application and order here referred to.

3. As appears from said application and order, PG&E, by entering into the said contracts, has voluntarily agreed

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to serve the said cities, from October 13, 1955 to // October 13, 1956, at a rate 8.3% higher than the said contract rate, at which the said cities were served by PG&E until that date. For the following year the new contracts provide for a rate 14.7% higher, and during the third year, for a rate 21.8% higher than the said contract rate. It is not until October 13, 1958, that these new contracts call for the rate at which PG&E has unlawfully charged Sierra since September 6, 1953, and which is 27.5% higher than the contract rate. In other words, PG&E is at the present time voluntarily serving the said cities at rates that are 17.6% lower than the rate which PG&E now asserts before this Commission that the public interest requires that it be permitted to charge Sierra for all electric energy delivered since

June 17, 1954. Moreover, it is only 8.3% higher than the contract rate, at which PG&E served all of the said cities until October 13, 1955, and which PG&E now asserts before this Commission "was, prior to June 17, 1954, and ever since has been (1) so low as to impair the financial ability of PG&E to continue its service to Sierra; (2) so low as to cast upon other consumers an excessive burden; and (3) so low as to be unduly discriminatory".

4. In its said application filed with the California Commission on December 19, 1955, and sworn to by Mr. N. R. Sutherland as its President and General Manager, (Ex. A), PG&E alleged:

> "* * * that said contract dated October 13, 1955 * * * is fair, just, and reasonable to the parties hereto; * * * that each of said parties is desirous of performing the covenants thereof; and that the furnishing and supplying of electric service by Pacific to Alameda at and in accordance with the rates, terms, and conditions contained therein and the full performance by the parties of their respective covenants *will not constitute a burden upon Pacific's other customers but will be of benefit and advantage to said other electric customers and to the public generally.*" (Emphasis added.)

5. In approving this contract, as well as, by reference, the contracts with the said other cities, the State Commission, in its said Opinion and Order (Ex. B), after referring to the foregoing allegations by PG&E, said:

> "In granting the authorization herein requested, the Commission calls attention to its position as stated in recent decisions that, if it should appear in a rate proceeding that any losses are being incurred because of deliveries under this contract, such losses are not to be imposed on Pacific's other electric customers."

Thus as recently as last February the California Commission has reasserted the condition upon which the existing contract between PG&E and Sierra was originally approved by it: that any loss under such special low rate contract must be borne by PG&E's stockholders, and not by its other customers.

6. It is respectfully submitted that these sworn statements, and the action of the State Commission taken thereon, conclusively show that the aforementioned allegations now advanced by PG&E in its said motion before this Commission are frivolous and sham.

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It is further respectfully submitted that PG&E should not be permitted to harass Sierra and take up the time of this Commission with further hearings, designed solely for the purpose of furthering PG&E's efforts to repudiate its contract, on the basis of such utterly groundless and unfounded allegations. PG&E's motion should be summarily denied.

Respectfully submitted,

Winthrop, Stimson, Putnam & Roberts
Attorneys for
Sierra Pacific Power Company
Office and P. O. Address
40 Wall Street
New York 5, N. Y.

William C. Chanler
J. Philip Bahn
Of Counsel

Dated: July 17, 1956

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EXHIBIT A

Before the Public Utilities Commission
of the State of California

In the matter of the application of PACIFIC GAS AND ELECTRIC COMPANY for an order of the Public Utilities Commission of the State of California granting and conferring upon applicant all necessary permission and authority to carry out the terms and conditions of a written contract for the sale of electric power and energy by and between applicant and the CITY OF ALAMEDA, dated October 13, 1955, (Exhibit "A" hereof).	APPLICATION No. 37595

Filed Dec 19 1955.

APPLICATION

To the Honorable, the Public Utilities Commission of the State of California:

In this petition, PACIFIC GAS AND ELECTRIC COMPANY (hereinafter called Pacific) seeks an order of the Public Utilities Commission of the State of California (hereinafter called Commission) granting and conferring upon it all necessary permission and authority to carry out the terms and conditions of a contract entered into by and between Pacific and the City of Alameda (hereinafter called Alameda) dated October 13, 1955, which said contract relates to the sale by Pacific and purchase by Alameda of all the electricity which shall be required by Alameda for its own use and for resale to its customers, and the terms and provisions of a termination agreement dated October 13, 1955, providing for the termination of the existing contract between Pacific and Alameda, hereinafter referred to, relating to a similar sale and purchase. Said contract and said termination agreement both dated October 13, 1955, were executed on behalf of Pacific on December 12, 1955.

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The authorization sought herein is requested pursuant to the California Public Utilities Code, particularly Sections 489, 532, and 701 thereof, and the Commission's General Order No. 96, particularly paragraph XA thereof.

In support of this petition, applicants aver as follows:

I

Pacific is engaged, principally, in the business of furnishing electric and gas service throughout a large part of northern and central California. It also distributes and sells water in a number of cities and towns and certain rural areas and produces and sells steam heat in certain parts of the cities of San Francisco and Oakland.

Pacific now is, and ever since the 10th day of October, 1905, has been, a corporation duly organized and existing under and by virtue of the laws of the State of California. Its principal place of business and its post office address are at 245 Market Street, San Francisco 6, California, and its attorneys in this matter are F. T. Searls, John C. Morrissey, and Malcolm A. MacKillop.

Communications in regard to this application should be addressed to F. T. Searls, General Attorney of Pacific, at the above mentioned address.

A certified copy of Pacific's Articles of Incorporation, as amended to date of this petition, is of record before the

Commission in connection with Pacific's Amended Third Supplemental Application No. 29548 (Exhibit "E"), filed October 28, 1955, and said Articles are incorporated herein by reference.

II

Pacific now is, and ever since April 1952 has been, furnishing and supplying resale electric service to Alameda

under and in accordance with the terms and conditions of an unexpired written contract dated June 26, 1951, which contract Pacific was authorized to carry out by the order of the Commission (Decision No. 46927) issued April 1, 1952, in Application No. 32733. Said Application No. 32733, the true copy of said contract dated June 26, 1951, attached thereto as Exhibit "A", and said Decision No. 46927 are all of record before the Commission and are made a part hereof by reference.

Section 6 of said contract dated June 26, 1951, (sometimes hereinafter called existing contract) provides that all electric energy furnished thereunder shall be delivered to and received by Alameda at four locations in the vicinity of (1) North End of Pearl Street, (2) North End of Broadway, (3) Encinal Terminals opposite the foot of First Avenue, Oakland, and (4) Alameda Portal of Posey Tube, and that Alameda will provide the necessary facilities to convey the electric energy from said points of delivery to Alameda's Central Substation and Webster Street Substation, at which substations are located the meters for measuring all electric energy delivered under said existing contract. Said contract further provides that the readings of said meters shall be combined for billing purposes.

III

Pacific and Alameda have entered into an agreement, dated October 13, 1955, in writing, providing for the termination of said existing contract as of October 1, 1955, to be effective upon receipt of authorization from the Commission to carry out the terms and conditions of a new contract, dated October 13, 1955, in writing, (hereinafter sometimes called new contract), for the sale by Pacific and purchase by Alameda of all electric power and energy required by Alameda for its own use and for resale to its

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electric // customers. A true and correct copy of said new contract, marked Exhibit "A", and a true and correct copy of said termination agreement, marked Exhibit "B", are each attached hereto and incorporated herein for all purposes.

The reasons for the execution by Pacific and Alameda of said new contract may be summarized as follows:

a. Alameda has requested Pacific to supply approximately 10,000 KVA of temporary power and additional temporary delivery capacity therefor not provided for in said existing contract, and the parties desire to provide, through the new contract, a basis upon which negotiation for such temporary service may be had.

b. Alameda anticipates the construction of a new substation, to be designated as Fernside Substation, and requests that provision be made for the delivery of electric power and energy to said substation when the growth of Alameda's load shall require it and that meters be located at said Fernside Substation and the readings thereof be combined with the meter readings at Alameda's Central and

Webster Street substations for billing purposes. Service to said new substation and the metering thereof is not provided for in said existing contract.

c. At the time of the foregoing requests by Alameda, Pacific was about to enter into negotiations for new contracts with other municipalities whose contracts with Pacific for resale electric service were about to expire. It was the desire of Pacific and said municipalities and Alameda to provide for the orderly application, through joint negotiation, of the rates set forth in Pacific's filed "Schedule R—Resale Service" to resale service supplied by Pacific to said municipalities and to Alameda, and, in order to avoid a

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discriminatory application of said Schedule R and // to make as nearly uniform as possible the rates and charges for resale service to all municipalities, it was the desire of Pacific and said municipalities and Alameda to negotiate contracts as nearly identical as circumstances would allow for all of said municipalities and Alameda.

In order to accomplish the foregoing and provide the terms and conditions therefor, Pacific and Alameda considered it desirable and to the best interests of the public generally to enter into the new contract rather than to amend said existing contract.

IV

Said new contract dated October 13, 1955, provides for the application of Pacific's said Schedule R (and such modified or revised Schedule R or new schedule in lieu thereof as the Commission may subsequently authorize) to service provided thereunder, save and except in the following particulars:

a. The last sentence of special condition (b) entitled "Demand", sometimes called the "ratchet clause", shall not apply.

b. The demand charge and energy charge during the first three years of the term of said new contract (hereinafter called interim charges) shall be less than that provided for in said Schedule R, such charges increasing for each of such first three years as more particularly set forth on page 2 of said new contract, Exhibit "A" hereof, to which reference is hereby made.

Exception a. was made for the reason that said "ratchet clause" was not contained in said existing contract. Exception b. was made in order to allow Alameda to make an orderly budgetary transition from the rates and charges under the existing contract to Schedule R rates and charges, [2735] and to // allow the opportunity for an orderly adjustment of Alameda's resale rates. Each of said exceptions was made, additionally, as the result of negotiations with the municipalities, including Alameda, as a group and in exchange for seven-year term contracts which would assure the retention of said municipalities as customers, as a group, for that period of time.

Rates and charges during the first three years of the term of said new contract are subject to increase or decrease commensurate with any increase or decrease authorized by the Commission in connection with said Schedule R or in any schedule authorized in lieu thereof, provided that if any such increase results in an increase in the net charges to Alameda, Alameda may terminate said agreement at any time within 120 days after the effective date of such increase, the termination to be effective three years from the date of such notice. Notification setting forth such increase shall be given to Alameda and to the Commission within 5 days of the effective date of any such Commission authorization. A similar right of termination on the same terms exists during the fourth and subsequent years of the term of said new contract if the Commission authorizes a modification or revision of said Schedule R or authorizes some other schedule in lieu thereof resulting in increased rates which in turn result in an increase in the net charges to Alameda.

The rates, terms, and conditions set forth in said new contract are identical to rates, terms, and conditions contained in new contracts concurrently offered to and accepted by the cities of Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Santa Clara, and Ukiah, save and except as to (1) the effective date, (2) an addendum to each of said

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contracts providing for delivery conditions of a // peculiarly local nature, and (3) the interim charges in the Healdsburg, Lompoc, and Ukiah contracts which are higher than the interim charges in the other contracts because said three cities have heretofore had higher rates under previous contracts authorized by the Commission.

A comparison of revenues and average rates under the existing contract, the new contract, and Schedule R, based on sales to Alameda for the year 1954 is as follows:

Sales		
Kwh		129,372,000
Maximum Kw		30,384
Actual Kw Months		316,128
Avg. Monthly L.F., %		56.1
Revenues		
Existing Contract:		
Amount	$	806,915
New Contract:		
Interim Rate, 1st Year		
Amount	$	874,044
% Increase		8.3
Interim Rate, 2nd Year		
Amount	$	925,197
% Increase		14.7
Interim Rate, 3rd Year		
Amount	$	982,669
% Increase		21.8
Schedule R,		
Amount	$	1,028,947
% Increase		27.5
Average Rate, Mills/Kwk		
Existing Contract		6.24
Interim Rate, 1st Year		6.76
Interim Rate, 2nd Year		7.15
Interim Rate, 3rd Year		7.60
Schedule R		7.95

V

The term of the new contract is for a period of seven years from and after October 1, 1955, and thereafter from year to year with the right in either party to terminate the contract at the expiration of the initial term or any subsequent contractual year by written notice given at least twelve (12) months prior to such termination date. Said contract is to be effective only upon receipt of authorization of the Commission to carry out all of the terms and provisions thereof.

The term of the existing contract of June 26, 1951 is from its effective date, April 21, 1952, to April 20, 1957. The said termination agreement will cancel said existing contract as of October 1, 1955, upon receipt of authorization from the Commission to carry out all of the terms and provisions of said new contract.

The new contract provides that it shall at all times be subject to such changes or modifications by the Commission as it may from time to time direct in the exercise of its jurisdiction.

VI

In further support of the authorization sought in the within application, Pacific alleges that it has given careful consideration to all of the facts and circumstances bearing on the matters herein involved and believes and therefore alleges that said contract dated October 13, 1955 (Exhibit "A" hereof), is fair, just, and reasonable to the parties hereto; that it will assure Pacific of the retention of Alameda as an electric resale customer of Pacific during the term thereof; that each of said parties is desirous of performing the covenants thereof; and that the furnishing and supplying of electric service by Pacific to Alameda at and in accordance with the rates, terms, and conditions contained therein and the full performance by the parties of their respective covenants will not constitute a burden upon Pacific's other customers but will be of benefit and advantage to said other electric customers and to the public generally.

Pacific also refers to and by reference incorporates

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herein the Commission's Decision No. 47832 issued October 15, 1952, in Application No. 32589, of record before the

Commission, authorizing Pacific to increase its rates to Alameda, through negotiation, either by placing Alameda on applicable filed tariff rates wherever possible or by submitting a renegotiated contract for approval by the Commission under General Order No. 96.

Wherefore, Pacific Gas and Electric Company respectfully prays that the Public Utilities Commission of the State of California duly give and make its order granting and conferring upon Pacific all necessary permission and authority to carry out the terms and conditions of the aforementioned contract with the City of Alameda dated October 13, 1955, (Exhibit "A" hereof) and the aforementioned termination agreement dated October 13, 1955, (Exhibit "B" hereof), and to render the service described in said contract under the terms, charges, and conditions therein set forth.

Dated at San Francisco, California, this 19th day of December, 1955.

Pacific Gas and Electric Company
By N. R. Sutherland
Its President and
General Manager

F. T. Searls
John C. Morrissey
Malcolm A. MacKillop

Attorneys for Pacific Gas
and Electric Company

245 Market Street
San Francisco 6, California

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State of California
City and County of San Francisco—ss.

N. R. SUTHERLAND, being first duly sworn, deposes and says:

That he is an officer of PACIFIC GAS AND ELECTRIC COMPANY, the applicant herein, to wit: its President and General Manager, and makes this affidavit as such on behalf of said applicant; that he has read the foregoing application and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief and as to those matters that he believes it to be true.

N. R. SUTHERLAND

Subscribed and sworn to before me
this 19th day of December, 1955.
CARL S. OLSEN
Notary Public in and for the City and
County of San Francisco, State of
California.

My Commission Expires Nov. 3, 1956.

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EXHIBIT B

Decision No. 52612

[Title of Commission and Cause Omitted]

OPINION AND ORDER

By the above-entitled application, filed December 19, 1955, Pacific Gas and Electric Company requests an order of the Commission authorizing it to carry out the terms and conditions of a contract, dated October 13, 1955, with the City of Alameda, which contract relates to the sale by Pacific and purchase by Alameda of all the electricity which will be required by Alameda for its own use and for resale to its customers; and to carry out the terms and provisions of a termination agreement, dated October 13, 1955, a copy of which is attached to the application as Exhibit B, providing for the termination of the existing contract between Pacific and Alameda relating to a similar sale and purchase. A copy of said new contract is attached to the application as Exhibit A.

Pacific now is, and ever since April, 1952, has been, furnishing and supplying resale electric service to Alameda under and in accordance with the terms and conditions of an unexpired written contract, dated June 26, 1951, which contract Pacific was authorized to carry out by Decision No. 46927, dated April 1, 1952, in Application No. 32733.

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Pacific and Alameda have entered // into an agreement providing for the termination as of October 1, 1955, of the existing contract, the term of which covered the period April 21, 1952 to April 20, 1957.

Pacific and Alameda considered it desirable and to the best interests of the public generally to enter into a new contract rather than to amend said existing contract for the following reasons:

a. Alameda has requested Pacific to supply approximately 10,000 kva of temporary power and additional temporary delivery capacity therefor not provided for in said existing contract, and the parties desire to provide, through the new contract, a basis upon which negotiation for such temporary service may be had.

b. Alameda anticipates the construction of a new substation, to be designated as Fernside Substation, and requests that provision be made for the delivery of electric power and energy to said substation when the growth of Alameda's load shall require it and that meters be located at said Fernside Substation and the readings thereof be combined with the meter readings at Alameda's Central and Webster Street substations for billing purposes. Service to said new substation and the metering thereof is not provided for in said existing contract.

c. At the time of the foregoing requests by Alameda, Pacific was about to enter into negotiations for new contracts with other municipalities[1] whose contracts with Pacific for resale electric service were about to expire. It was the desire of Pacific and said municipalities and Alameda to provide for the orderly application, through joint

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negotiation, of the rates set // forth in Pacific's filed Schedule R, Resale Service, modified (ratchet eliminated) to resale service supplied by Pacific to said municipalities and to Alameda. In order to avoid a discriminatory application of Schedule R and to make as nearly uniform as possible the rates and charges for resale service to all municipalities, it was the desire of Pacific and said municipalities and Alameda to negotiate contracts as nearly identical as circumstances would allow for all of said municipalities and Alameda.

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[1] Lompoc, Ukiah, Palo Alto, Lodi, Santa Clara, Healdsburg, Biggs, Gridley.

The new contract, to become effective and continue in force until the expiration of seven years from and after October 1, 1955, provides for the application of Pacific's filed Schedule R, Resale Service, to service provided thereunder except as follows:

1. The last sentence of special condition (b) of Schedule R, entitled "Demand" and referring to the so-called ratchet clause* for computation of demand charges is not to apply.
2. The demand and energy charges during the first three years of the term of the contract, called interim charges, shall be less than those provided for in Schedule R but shall be increased for each of the first three years in accordance with the charges set forth in the contract.

During the fourth and subsequent years of the term of the contract the rates, charges and conditions shall be those in accordance with Schedule R with the exception that the ratchet clause pertaining to demand shall not apply.

The rates to be paid by the city for electric energy to be furnished during the first three years of the contract term are as follows:

---

*The ratchet clause provides that maximum demands in the preceding 11 months be taken into consideration in determining demands for billing purposes.

Demand Charge:	First Year	Second Year	Third Year
	Per Month		
First 50 kw or less of maximum demand	$79.00	$83.00	$87.00
Next 150 kw of maximum demand, per kw	1.58	1.65	1.73
Next 300 kw of maximum demand, per kw	1.05	1.10	1.15
Next 500 kw of maximum demand, per kw	.79	.83	.87
Next 1,000 kw of maximum demand, per kw	.64	.68	.72
All excess kw of maximum demand, per kw	.43	.45	.48

[2743]

Energy Charge (to be added to the Demand Charge):

	Per Kwhr		
First 150 kwhr per kw per month	$0.0075	$0.0079	$0.0084
Next 150 kwhr per kw per month	.0053	.0057	.0060
All over 300 kwhr per kw per month	.0043	.0045	.0048

Except that for all energy furnished in excess of 8,000,000 kwhr per month, the above rates shall be reduced by 0.5 mill per kwhr.

Minimum Charge:

Applicable when maximum demand in the current month or in one or more of the preceding 11 months has exceeded 25,000 kw—$1.40 per month per kw of such maximum demand.

Special conditions relating to voltage discount, demand, and power factor are also included as part of the contract.

The above rates differ from those embodied in the contract only to the extent of correcting certain typographical omissions by inserting "per month" and "per kw" in the demand tabulation and "per kwhr" in the energy tabulation. Such corrections are for clarification only.

Pacific states that the interim rates and charges during the first three years as set forth in the new contract were adopted to permit Alameda to make an orderly budgetary transition from the rates and charges under the existing contract to Schedule R rates and charges (ratchet eliminated) and to allow for an orderly adjustment of Alameda's resale rates. The ratchet clause is not included in the presest contract since the prior contract did not contain the ratchet clause provision. The interim rates and elimination of the ratchet clause are the result of negotiations with Pacific by municipalities similarly served by Pacific, including Alameda, and are in exchange for seven-year term contracts which would assure the retention of the municipalities as customers, as a group, for that period of time.

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Comparative revenues and average rates based on sales to Alameda for the year 1954 are as follows:

	Revenues	Average Rate Mills/kwhr	Increase Over Existing Contract
Existing Contract	$ 806,915	6.24	—
New Contract			
1st Year	874,044	6.76	8.3%
2nd Year	925,197	7.15	14.7
3rd Year	982,669	7.60	21.8
4th and Subsequent Years (Schedule R Modified)	1,028,947	7.95	27.5

The rates, terms and conditions set forth in the new contract are identical to rates, terms and conditions contained in new contracts concurrently offered to and accepted by the other municipalities except as to (1) the effective date, (2) an addedum to each of said contracts providing for delivery conditions of a peculiarly local nature, and (3) the interim charges in the Healdsburg, Lompoc and Ukiah contracts which are higher than the interim charges in the other new contracts because said three cities have heretofore had higher rates under previous contracts authorized by this Commission, all of which said new contracts are presented to this Commission for its authorization concurrently herewith.

The term of the contract is for a period of seven years from and after October 1, 1955, and shall continue thereafter from year to year, provided, however, that either party shall have the right to terminate the contract at the expiration of either the initial term or any subsequent contractual year by giving the other written notice to that effect at least twelve months prior to such termination date. The contract further provides that if, during the first three years of the contract, this Commission shall authorize an increase or decrease in the rates or charges of Pacific's Schedule R, then Pacific

[2745]

shall be entitled to increase // or decrease the interim rates and charges concurrently and commensurately therewith. In the event that Pacific exercises its right to increase the interim rates and charges and should such increase result in an increase in the net charges for service to the city, then the latter may terminate this contract by written notice to Pacific within 120 days after the effective date of such increase, said termination to be effective three years from the date of such notice. A similar right of termination exists during the fourth and subsequent years of the contract if this Commission authorizes modifications or revisions of Schedule R resulting in an increase in the net charges to Alameda.

The contract provides that it shall at all times be subject to such changes or modifications by this Commission as it may from time to time direct in the exercise of its jurisdiction.

Pacific alleges that the contract is fair, just and reasonable to the parties thereto and that the furnishing and supplying of electric energy and service by Pacific to Alameda in accordance with the terms of the contract will not constitute a burden upon Pacific's other customers but will be of benefit and advantage to said other electric customers and to the public generally.

Applicant also refers to this Commission's Decision No. 47832, dated October 15, 1952, in Application No. 32589, authorizing Pacific to increase its rates to Alameda through negotiation, either by placing Alameda on applicable filed tariff rates wherever possible or by submitting a renegotiated contract for approval by this Commission.

In granting the authorization herein requested, the Commission calls attention to its position as stated in recent decisions that, if it should appear in a rate proceeding that

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any // losses are being incurred because of deliveries under this contract, such losses are not to be imposed on Pacific's other electric customers.

Cognizance is also taken of the city's right to terminate the contract under certain conditions when and if the rates and charges are changed so as to increase net charges paid by Alameda. Applicant and the city are hereby put on notice that in any future rate proceeding this Commission will not be obligated to consider the opposition of either party to any proposed changes in this contract predicated on the basis that a contract between the parties already exists as authorized by this Commission.

It has heretofore been noted that the new contract omits from the applicable rate schedule a so-called ratchet clause. Such a clause has been in Pacific's resale and some of its power schedules for many years. The authorization of this contract is not to be construed as denying the appropriateness of such a clause.

The Commission having considered the request of the applicant and being of the opinion that the application should be granted and that a public hearing is not necessary, therefore,

It Is Hereby Ordered that Pacific Gas and Electric Company be and it is authorized to:

1. Carry out the terms and conditions of the written contract, dated October 13, 1955, with the City of Alameda, and to render the service described therein under the terms, charges and conditions stated therein.
2. Carry out the terms and conditions of the termination agreement, dated October 13, 1955, providing for the termination of an existing contract, dated June 26, 1951, relating to the sale and purchase of electric energy.

[2747]

It Is Further Ordered that Pacific Gas and Electric Company shall file a statement, promptly after termination, showing the date when said new contract was terminated.

The effective date of this order shall be twenty days after the date hereof.

Dated at Los Angeles, California, this 14th day of February, 1956.

Peter E. Mitchell
President
Justus F. Craemer
Ray E. Untereiner
Matthew J. Dooley
Rex Hardy
Commissioners

Certified as a True Copy
Noel Coleman
Asst. Secretary, Public Utilities Commission
State of California

[2748]

UNITED STATES OF AMERICA

Before the

FEDERAL POWER COMMISSION

Docket No. E-6697

SIERRA PACIFIC POWER COMPANY
vs.
PACIFIC GAS AND ELECTRIC COMPANY

COMPLAINT OF SIERRA PACIFIC POWER COMPANY IN RESPECT OF UNLAWFUL DEMANDS MADE BY PACIFIC GAS AND ELECTRIC COMPANY FOR PAYMENT FOR ELECTRIC ENERGY IN EXCESS OF THE LAWFULLY FILED RATE

Sierra Pacific Power Company (herein called "Sierra" or "complainant") complaining of Pacific Gas and Electric Company (herein called "PG&E" or "defendant"), pursuant to the provisions of the Federal Power Act (herein called the "Act") and particularly Section 306 thereof, and pursuant to this Commission's Rules of Practice and Procedure and particularly Section 1.6(b) thereof, alleges that the said defendant is now and since February 27, 1956 has been wilfully, knowingly and unlawfully demanding for the transmission and sale of electric energy subject to the jurisdiction of this Commission a rate or charge different from that prescribed in its rate schedule now lawfully on

[2749]

file with the Commission. In support thereof, // Sierra respectfully alleges as follows:

1. Complainant, a corporation organized and existing under the laws of the State of Maine, is a public utility

under the laws of the States of Nevada and California and is a customer of and purchases a major portion of its electric energy from defendant, which is a corporation organized and existing under the laws of the State of California and a public utility under such laws.

2. The name and address of complainant is as follows:
Sierra Pacific Power Company
Reno, Nevada
Attention: Mr. Frank A. Tracy.

It is respectfully requested that copies of any papers, notices, motions or other documents in this proceeding be served in addition upon complainant's attorneys, addressed as follows:
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York 5, New York
Attention: Mr. William C. Chanler.

3. The name and address of the defendant is as follows.
Pacific Gas and Electric Company
245 Market Street
San Franicsco 6, California.

4. As is fully set forth in the record of the proceedings before the Commission in *In the Matter of Pacific Gas and Electric Company,* Docket No. E-6482, defendant sells electric energy to complainant under a contract on file with

[2750]

the Commission // as defendant's Rate Schedule FPC No. 3. This contract was duly filed with the Commission on or about June 7, 1948 and is still in full force and effect.

5. On or about February 2, 1953, defendant filed with the Commission a schedule of increased rates, which sched-

ule was designated as Supplement No. 1 to defendant's Rate Schedule FPC No. 3, and provided by its terms that it was to supersede said Schedule FPC No. 3.

6. The Commission, by orders issued March 13 and September 28, 1953, in Docket No. E-6482, entered upon a hearing concerning the lawfulness of the rates proposed in said Supplement No. 1 and ordered such rates effective pending such hearing, as of September 6, 1953. Subsequently, in its Opinion No. 270 and accompanying order issued June 17, 1954, the Commission held that the filing of said Supplement No. 1 superseded the rate schedule set forth in defendant's Rate Schedule FPC No. 3 as of September 6, 1953 and ordered the inquiry into the lawfulness of said Supplement No. 1 terminated.

7. The Commission's order of June 17, 1954 was duly set aside by a decree entered on February 24, 1955 by the United States Court of Appeals for the District of Columbia Circuit. Subsequently, on writ of certiorari to review the decree, the Supreme Court of the United States on February 27, 1956 entered a judgment affirming the decree of the Court of Appeals. In its opinion of the same date, a copy of which, on information and belief, was duly mailed

to defendant by // the Clerk of the Supreme Court, that Court held, among other things, that:

> "* * * neither PG&E's filing of the new rate [Supplement No. 1] nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra."

8. On June 12, 1956 there was entered and filed in the United States Court of Appeals for the District of Columbia Circuit an order which recited both the February 1955

decree setting aside the Commission's order of June 17, 1954 and the judgment of the Supreme Court of the United States affirming that decree.

9. On information and belief, on or about June 12, 1956 a copy of said order was duly mailed to defendant by the Clerk of the said Court of Appeals.

10. Attached hereto, made a part hereof, and marked "Exhibit A", is a true and correct copy of the bill sent by defendant to Sierra on or about July 6, 1956 for all electric energy purchased from defendant by Sierra during the month of June, 1956, and for an "unpaid balance" of $192,776.95.

11. The said bill reproduced at Exhibit A, so far as it pertains to electric energy sold during the month of June, 1956, is computed under defendant's invalid and unlawful Supplement No. 1 to defendant's Rate Schedule FPC No. 3, and constitutes an unlawful demand for payment at the schedule of rates set forth in said Supplement No. 1.

12. Similar bills computed under defendant's invalid

and unlawful Supplement No. 1 were submitted by defendant for electric energy delivered to complainant in the months of February, March, April and May, 1956. For each of said months complainant paid defendant the amount lawfully due for said electric energy, computed under defendant's Rate Schedule FPC No. 3, that being the only rate schedule now lawfully on file with this Commission for service by defendant to complainant. The demand for payment of an "unpaid balance" of $192,776.95 contained in the bill herein reproduced at Exhibit A represents the difference between the amounts unlawfully demanded by defendant for the months of February, March, April and

May and the amounts lawfully due and actually paid by complainant.

13. At the time defendant compiled and sent said bill reproduced at Exhibit A, as well as at the times defendant sent complainant bills demanding payments at unlawful rates for the months of February, March, April and May, 1956, defendant well knew that the rate set forth in said Supplement No. 1 was and has been declared unlawful by the Supreme Court of the United States. As defendant also well knows, it is a violation of Section 205(d) of the Act and Section 35.2 of the Commission's Regulations thereunder for defendant to charge Sierra at any rate for electric energy delivered to it other than the rate now lawfully on file with this Commission, which, as defendant well knows, is defendant's Rate Schedule FPC No. 3. In continuing to charge

[2753]

complainant at the unlawful rate con- // tained in its Supplement No. 1, defendant is showing the same disregard for the decisions of the Supreme Court of the United States, the acts of the Congress of the United States, and the Regulations of this Commission, as it has shown throughout the present controversy for its solemn contractual obligations.

14 Defendant's unlawful demands for payment at illegal rates are causing and will continue increasingly to cause irreparable damage to Sierra, for, until the bills containing such demands are withdrawn, it will be necessary for Sierra to show both on its books and in such financial statements as it is required to issue or file, not only that it has made less than full payment of the amount actually billed for electric energy purchased by it, but that monthly claims are being made against it for amounts in excess of 25% of complainant's entire monthly cost of purchased power.

Moreover, complainant intends to issue securities to the public in October of 1956 for the purpose of expanding its facilities to meet increasing demands for its service. At that time the so-called "unpaid balance" demanded from it by defendant, if the present unlawful practice is permitted to continue, will amount to approximately $400,000. The existence of so substantial a claim will have to be disclosed to prospective purchasers of complainant's securities, notwithstanding the fact that it is clearly unlawful, thus irreparably injuring complainant in connection with such sale of securities.

[2754]

WHEREFORE, complainant respectfully requests that the Commission take such action as it may deem appropriate for the purpose of enforcing compliance with the Act and the Commission's rules and regulations thereunder.

Respectfully submitted,

Winthrop, Stimson, Putnam & Roberts
Attorneys for Sierra Pacific Power Company
Office and P. O. Address:
40 Wall Street
New York 5, New York

William C. Chanler
J. Philip Bahn
Of Counsel.

Dated: July 20, 1956.

[2755]

State of New York
County of New York—ss.:

William C. Chanler, being first duly sworn, deposes and says that he is one of the attorneys for Sierra Pacific Power Company, the aforementioned complainant, that the facts alleged in the foregoing complaint are true and correct with the exception of the facts alleged on information and belief, which facts he believes to be true and correct, and that he, rather than an officer of the complainant, has made this verification in order to bring the complaint before the Commission as expeditiously as possible.

William C. Chanler

Subscribed and sworn to
before me this 20th
day of July, 1956.
James J. Farrell
Notary Public, State of New York
Qualified in Bronx County
Certified N. Y. County No. 03-1166500
Commission Expires March 30, 1957

(Seal)

* * * * * * *

[2758]

JUL 26 1956

Docket No. E-6697 Registered

Sierra Pacific Power Company vs. P. G. & E. Co.

Pacific Gas and Electric Company
245 Market Street
San Francisco 6, California

Gentlemen:

There is enclosed a copy of the Complaint filed in the above designated matter.

Your attention is invited to Section 1.9 of the Commission's Rules of Practice and Procedure, which requires that answers to Complaints shall be filed within 30 days after service thereof.

Very truly yours,

J. H. Gutride
Acting Secretary.

Enclosure No. 48186

[2759]

FEDERAL POWER COMMISSION
Washington 25

Registered

Docket No. E-6697

Sierra Pacific Power Company

vs.

Pacific Gas and Electric Company

JUL 31 1956

California Public Utilities Commission
California State Building
San Francisco 2, California

Gentlemen:

Pursuant to the provisions of the Commission's Plan of Cooperative Procedure with State Commissions, your attention is invited to the above-designated proceeding which is now pending before this Commission and which is more fully described in the enclosure.

We will be pleased to have you notify us whether you deem the proceeding one which should be considered under the cooperative provisions of the Plan. If so, please advise the nature of your interest in the matter and whether you desire a conference, the creation of a board, or a joint or concurrent hearing, and the reasons for such request.

If you feel that this proceeding is not one in which it would be advantageous to invoke the cooperative provisions of the Plan, we would nevertheless appreciate receiving any comments or suggestions which you think might be helpful in the consideration of this matter.

Unless we hear from you within 15 days or by the date, if any, specified in the enclosure, we will assume that you have no representations to make.

Very truly yours

/s/ J. H. GUTRIDE
Acting Secretary.

[2760]

STATE OF NEVADA

PUBLIC SERVICE COMMISSION

Carson City, Nevada
August 10, 1956

Federal Power Commission
Washington, D. C.

Attention: Mr. J. H. Gutride,
Acting Secretary

Re: Docket No. E-6697
Sierra Pacific Power Company
vs. Pacific Gas and Electric Company

Gentlemen:

We acknowledge receipt of your letter of July 31, 1956. This Commission does not deem the proceeding one which should be considered under the cooperative provisions of the Plan. It would seem to us to be somewhat inconsistent to even bring the matter up since the Supreme Court of the United States has decided all of the points in question.

We refer you to our letter of March 30, 1953 in re: Docket No. E-6482. A copy of this letter is enclosed, and in it we think you will find, again, some of the reasons why this Commission, at this time, feels that the Pacific

Gas and Electric Company application for reopening of the matter is just out of line. No appeal from the decision of the United States Supreme Court to a commission of lesser jurisdiction is possible, in our estimation.

Sincerely,

PUBLIC SERVICE COMMISSION OF NEVADA
ROBERT A. ALLEN
Chairman

RAA:NI
Enclosure

[2761]

STATE OF NEVADA

PUBLIC SERVICE COMMISSION

March 30, 1953

Federal Power Commission
Washington, D. C.

Attention: Mr. Leon M. Fuquay, Secretary

Gentlemen: In re: Docket No. E-6482

This Commission, under date of March 2, stated in a telegram addressed to you that it opposed any increase in rates as requested by Pacific Gas and Electric insofar as the request concerned the Sierra Pacific Power Company purchase of power at wholesale for retail to its customers in the State of Nevada on the following grounds:

1—The retail sale of power so purchased by Sierra Pacific Power Company is under the jurisdiction of this Commission as to rates and rules and regulations.

2—This Commission has been advised and so believes that contract between Pacific Gas and Electric and Sierra Pacific Power Company was promoted by Pacific Gas and

Electric and they agreed to furnish Sierra Pacific Power Company with electricity for the use of the people of western Nevada for a term of 15 years at a rate which was below that offered by other power companies and which rate compared favorably with the rates offered to Sierra Pacific Power Company by the Bureau of Reclamation.

3—As one of the obligations assumed by Sierra Pacific Power Company to obtain its electricity from Pacific Gas and Electric, Sierra Pacific Power Company had to agree that it would buy all of its power from Pacific Gas and Electric over and above that which it could generate in its own plants as were in existence on the date of the contract, March 4, 1948.

4—Over 80% of the customers to which Pacific Gas and Electric furnishes power through Sierra Pacific Power Company are located in the State of Nevada.

5—Had there been any doubt of the validity of the contract between the two companies, this Commission would have ordered Sierra Pacific Power Company to construct its own power stations on the Truckee, Carson, and Walker Rivers in Nevada and a steam plant to supplement the hydro power developed on those streams.

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6—At this late date any abrogation of the contract, or modification of the same, would continue to deprive Sierra Pacific Power Company of its right to seek power elsewhere at favorable rates, and after Sierra Pacific Power Company has invested over one million dollars in facilities for the purpose of performing its part of the contract.

Sierra Pacific Power Company has been forced to refrain from expanding its own generating capacity because of its obligation under the contract which it had entered into in good faith with Pacific Gas and Electric.

Pacific Gas and Electric stated to the California Public Utilities Commission that the contract so made with Sierra Pacific Power Company was beneficial to Pacific Gas and Electric's shareholders and "should it prove non-compensatory, the shareholders rather than the customers of Pacific would bear any resulting burden". Therefore, if the said contract is altered and the rates increased, it will be unreasonable and injurious to the public interest of the State of Nevada and its people.

The State of Nevada, through its Public Service Commission, prays that the contract be not altered and the petition for increased rates as filed by Pacific Gas and Electric be denied.

Sincerely yours,

Public Service Commission of Nevada
Original Signed by
Robert A. Allen
Chairman

RAA:jm

[2763]

[Title of Commission and Cause Omitted]

ANSWER

Defendant, Pacific Gas and Electric Company, answers the complaint in the above-entitled proceedings as follows:

I.

Defendant denies each and every allegation contained in the introductory unnumbered paragraph of the complaint.

II.

Defendant denies each and every, all and singular, the allegations of Paragraph 4 of the complaint herein, except that it admits it sells electric power to complainant in accordance with the terms of the contract, duly filed on or about June 7, 1948 as Rate Schedule F.P.C. No. 3 and Supplement No. 1 thereto duly filed on or about February 2, 1953.

[2764]

III.

Defendant denies each and every, all and singular, the allegations of Paragraph 7 of the complaint herein, except that it admits that the Commission's order of June 17, 1954 was reviewed by the District Court of Appeals of the District of Columbia Circuit, which, by a decree entered on February 24, 1955, as amended by an order dated March 23, 1955, set aside and remanded the case to the Commission with instructions to dismiss the proceeding without prejudice to the initiation of a new proceeding under Section 206(a) of the Federal Power Act; that subsequently on a writ of certiorari to review the Court of Appeals decree, the Supreme Court of the United States on February 27, 1956 affirmed the decision of the said Court of

Appeals setting aside the Commission's said order, but instructed that the case be remanded to the Commission for such further proceeding not inconsistent with the opinion of the Supreme Court as the Commission may deem desirable. That in the Supreme Court's opinion of the same date, a copy of which was mailed to the defendant, that Court held, among other things, that—

> "* * * neither PG&E's filing of the new rate [Supplement No. 1] nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra.
>
> This case, however, raises a further question not present in the Mobile case. The Commission had un- [2765] doubted power under § 206(a) // to prescribe a change in contract rates whenever it determines such rates to be unlawful. While this power is limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order, the commission's order here, if based on the necessary findings, could have been effective to prescribe the proposed rate as the rate to be in effect prospectively from the date of the order, June 17, 1954. * * * If the proceedings here satisfied in substance the requirements of § 206(a), it would seem immaterial that the investigation was begun as one into the reasonableness of the proposed rate rather than the existing contract rate."

And that by a motion filed April 16, 1956, complainant requested the Supreme Court of the United States (1) to amend its instructions upon remand to limit further proceedings before the Commission to the determination of the lawfulness of the contract rate "at the time of such further proceedings" and the fixing of the rate "thereafter to be observed and in force", and (2) to declare that any amounts paid by Sierra in excess of the contract rates were unlawfully collected and that defendant was obligated to make restitution of the excess payments, and that on May 28, 1956, the Supreme Court denied said motion without prejudice to the future determination of such rights as complainant might have to restitution.

IV.

Defendant denies each and every, all and singular,

the allegations of Paragraph 8 of the complaint herein, except as specifically admitted by Paragraph III above.

V.

Defendant denies each and every, all and singular, the allegations of Paragraph 11 of the complaint herein, except that it admits that the bill reproduced as Exhibit "A" attached to the complaint, so far as it pertains to electric energy sold during the month of June, 1956, sets forth charges computed under defendant's Supplement No. 1 to Rate Schedule F.P.C. No. 3.

VI.

Defendant denies each and every, all and singular, the allegations of Paragraph 12 of the complaint herein, except that it admits that it submitted to complainant similar bills presenting charges computed under defendant's Supplement No. 1 for electric energy delivered to complainant in the months of February, March, April and May, 1956 and that the demand for payment of the unpaid balance of $192,776.95 contained in the bill reproduced as Exhibit "A" to the complaint, represents the difference between the amounts billed by the defendant for the months of February, March, April and May and the amounts actually paid by complainant.

[2767]

VII.

Defendant denies each and every, all and singular, the allegations contained in Paragraph 13 of the complaint herein, except that it admits that *"unless the Commission otherwise orders"* it is a violation of Section 205(d) of the Federal Power Act and Section 35.2 of the Commission's regulations for defendant to charge complainant at any rate for electric energy delivered to it, other than the rate lawfully on file with the Commission.

VIII.

Defendant denies that it has made unlawful demands for payment at illegal rates as alleged in Paragraph 14 of the complaint, and defendant further alleges that it has not sufficient knowledge, information or belief to enable it to answer the other allegations in Paragraph 14 of the complaint and, therefore, for lack of such knowledge, information or belief, defendant generally and specifically denies each and every, all and singular, the allegations contained therein.

IX.

The sequence of orders dealing with the rate set out in Supplement No. 1 was as follows:

a. The Commission on March 13, 1953 provided that the

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rates in Supplement No. 1 would be effective as // of September 6, 1953 on temporary basis pending final determination by the Commission of the lawful rate.

b. The Commission by its order of June 17, 1954 held the rates in Supplement No. 1 to be lawful rates.

c. The Court of Appeals for the District of Columbia Circuit by its decree of February 24, 1955 set aside the Commission order of June 17, 1954 and remanded the case to the Commission.

d. The Supreme Court by its judgment of February 27, 1956 affirmed the decree of the Court of Appeals, but instructed that the case be remanded to the Commission "for such further proceedings, not inconsistent with the opinion of this Court, as the Commission may deem desirable."

e. Sierra sought to have the Supreme Court (1) amend its instructions upon remand to limit further proceedings before the Commission to the determination of the lawfulness of the contract rate "at the time of such further proceedings" and the fixing of the rate "thereafter to be observed and in force," and (2) declare that any amounts paid by Sierra in excess of the contract rates were unlawfully collected and that defendant was obligated to make restitution of the excess payments. On May 28, 1956, the Supreme Court denied said motion without prejudice to the future determination of such rights as Sierra might have to restitution.

f. Both the United States Court of Appeals for the District of Columbia Circuit and the United States Supreme Court have reviewed the Commission's said Opinion No. 270 and the proceedings had in connection therewith. As a result of the reviews, the said Court of Appeals ordered on June 12, 1956 "that this case be, and it is hereby remanded to the Federal Power Commission for such further proceedings not inconsistent with the opinion of the Supreme Court in No. 51, October Term, 1955, Federal Power Commission v Sierra Pacific Power Company, and No. 53, October Term, 1955, Pacific Gas and Electric Company v. Sierra Pacific Power Company, as the Commission may deem desirable."

g. On or about June 12, 1956 the defendant filed a motion with the Commission asking that the said proceedings be reopened. The Commission has not yet issued its order in response to this motion, a copy of which we attach hereto and make a part hereof as Exhibit No. 1.

The Supreme Court's opinion specifically indicates that the determination of the lawful rate is the prerogative of the Commission and that in exercising such jurisdiction it may prescribe a change in contract rates whenever it determines such rates to be unlawful. The Supreme Court's opinion expressly states that the Commission order of June 17, 1954

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could have been // effective to prescribe the proposed rate (Supplement No. 1) as the rate to be in effect prospectively from the date of the order, June 17, 1954, if based on the necessary findings. The Court went on to state that "if the proceedings here satisfied in substance the requirements of Section 206(a), it would seem immaterial that the investigation was begun as one into the reasonableness of the proposed rate rather than the existing contract rate."

The Court's opinion goes on to point out that the Commission had applied an erroneous standard in judging the proper rate to be authorized. The Commission should have decided whether the rates in Rate Schedule F.P.C. No. 3 were so low as to adversely affect the public interest. Therefore, the Court necessarily affirmed the decision of the Court of Appeals setting aside the Commission's order and directed "the case" remanded to the Federal Power Commission "for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable."

X.

The Commission, by order adopted September 25, 1953 and issued September 28, 1953, declared that the proposed rates of said Supplement No. 1 had become effective as of

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September 6, 1953, subject to certain provisions // of Section 205(e) of the Federal Power Act and made certain orders with respect to accounting and to refund in the event that any portion of the increased rates should be found not to be justified. Subsequently, the Commission, by Opinion No. 270 adopted June 16, 1954 and issued June 17, 1954, found that the proposed rate of said Supplement No. 1 was just, reasonable and lawful and, that "if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful;" and in effect by order authorized defendant to charge and collect from complainant said proposed increase under Supplement No. 1 to Schedule F.P.C. No. 3. The Commission has not mended or rescinded its said Opinion No. 270 and the order contained therein, and the Commission has not made any further order with respect to said Supplement No. 1. Consequently, the bills rendered to complainant by defendant lawfully demand payment at the schedule of rates set forth in said Supplement No. 1.

XI.

The rate charged by defendant is being charged in accordance with Supplement No. 1 to Rate Schedule F.P.C. No. 3. The Commission authorized this rate by its order of

[2772]

June 17, 1954, which is a lawful order // if properly supported by facts showing that the standard specified by the Supreme Court's opinion is met. The Commission's order is properly supported by such facts. Consequently, the rate being charged the compainant by defendant is lawful.

XII.

Although, as heretofore stated, said order of the Commission was set aside by order of the Court of Appeals, said Supplement No. 1 was permitted by the Court to remain on file with the Commission pending final disposition of the matter pursuant to the remand. Unless and until that filing is rejected, defendant must charge the rate therein specified. This is not the situation presented in *United Gas Pipe Line Company v. Mobile Gas Service Corporation,* (...... US ......, 100 L Ed 291 (Advance); 76 Sup. Ct. 373; 12 PUR (3) 112) where the rate filing was originally ineffective and remained so for the entire period in question—a nullity as the court said. We are here concerned with a filing which, although ineffective during the pendency of the Commission proceedings ,was expressly stated to be capable of effect if the substantive requirement of Section 206(a) of the Federal Power Act were met.

The Commission has yet to determine whether or not the

essential condition to the lawfulness of said // Supplement No. 1 exists and has existed ever since the date of the Commission's said Opinion No. 270, i.e., whether or not said Rate Schedule F.P.C. No. 3 is and was contrary to the public interest. If the Commission should find the existence of said essential condition, clearly it cannot reject the filing of said Supplement No. 1 and its lawfulnes will be fully established. On the other hand, if the Commission should fail so to find, then it must reject the filing of said Supplement No. 1 and complainant would be entitled, under equitable principles governing restitution, to have refunded to it all payments in excess of the lawful rate as finally determined.

XIII.

The Commission now has before it the defendant's motion asking the Commission to reopen the proceedings in F.P.C. Docket No. E-6482. When reopened, the issues presented for decision by the Commission in Docket No. E-6482 will be substantially the same as those raised by the complainant's complaint herein.

WHEREFORE, Pacific Gas and Electric Company, defendant herein, respectfully requests that the complaint

[2774]

herein be dismissed, or in the alternative that it be // consolidated for hearing with the proceedings in F.P.C. Docket No. E-6482.

Dated: August 24, 1956.

Respectfully submitted:

Pacific Gas and Electric Company
By L. Harold Anderson
Its Vice President and Assistant
General Manager

F. T. Searls
John C. Morrissey
Attorneys for Defendant
Pacific Gas and Electric Company
245 Market Street
San Francisco 6, California.

[2775]

State of California
City and County of San Francisco—ss.

The undersigned, being first duly sworn, deposes and says:

That he is an officer of Pacific Gas and Electric Company, the defendant herein, to wit: its Vice President and Assistant General Manager, and makes this affidavit as such on behalf of said defendant; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief and as to those matters that he believes it to be true.

L. Harold Anderson

Subscribed and sworn to before me
this 24th day of August, 1956.
Carl S. Olsen
Notary Public in and for the City
and County of San Francisco,
State of California.
My Commission Expires:
November 3, 1956.
(Seal)

* * * * * * *

[2776]

EXHIBIT No. 1

* * * * * * *

[2777]

PUBLIC UTILITIES COMMISSION
State of California

August 30, 1956

Federal Power Commission
Washington 25, D. C.

Gentlemen:

This will acknowledge receipt of your letter dated July 31, 1956, relative to possible cooperative procedure in your Docket No. E-6697, Sierra Pacific Power Company vs Pacific Gas and Electric Company.

It would appear that this is a matter within the jurisdiction of the Federal Power Commission, and involves litigation between two utilities. This Commission believes that the matter does not warrant invocation of the cooperative provisions of your Commission's Plan of Cooperative Procedure.

The Commission has no comments or suggestions to make regarding this complaint.

Yours very truly,

PUBLIC UTILITIES COMMISSION, STATE OF CALIFORNIA

By
R. J. Pajalich, *Secretary*

[2778]

Before the

FEDERAL POWER COMMISSION

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY	Docket No. E-6482

REPLY OF PACIFIC GAS AND ELECTRIC COMPANY TO ANSWER OF SIERRA PACIFIC POWER COMPANY FOR REOPENING AND FURTHER HEARING

Pacific Gas and Electric Company, hereinafter called "PG&E" replies to the answer and supplemental answer of Sierra Pacific Power Company, hereinafter called "Sierra", on PG&E's Motion for Reopening of this proceeding as follows:

I

In attempting to answer the motion for reopening Sierra relies upon matters not in evidence in this proceeding. The Commission should not and can not consider the evidence submitted in Sierra's four exhibits without reopening this proceeding and, of course, any reopening should be such as to permit both parties to introduce evidence and not merely to accept Sierra's exhibits. It is respectfully submitted therefore that either the Commission should disregard those portions of Sierra's answer and supplemental answer, which

[2779]

rely on said exhibits or should grant PG&E's motion // and reopen the record for both parties. Granting of the motion would be merely a preliminary step permitting the full development of the issues for the Commission.

II

Sierra devotes a great deal of space to arguing that the Commission is not obligated to hold further hearings.[1] We, of course, fully recognize that the Court stated that the proceeding was remanded "for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable." It seems very clear that the Commission must take some further action in order to finally dispose of the case. It is equally clear that the nature of the further proceedings was left to the discretion of the Commission.

When Sierra attempts to argue to this Commission that such further proceedings should be limited to the rate for the future, Sierra is in effect asking this Commission to reverse the Supreme Court ruling made in this very case. The Supreme Court refused to hold, as Sierra had contended, that the hearing must be limited to future rates.[2] Instead the Court sent the matter back to permit an administrative determination which could be made in the first instance only

by the Commission. The "without prejudice" // clause of the order denying Sierra's motion simply meant that the Court would not prejudge the issues on restitution. If there is a controversy between the parties as to whether the contract was contrary to the public interest, the Commission should reopen the proceeding to make the necessary administrative determination and not dispose of the entire case in summary fashion.

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[1] Sierra's Answer, pp. 2-5.

[2] Sierra finds some consolation in the fact that three justices of the Supreme Court were of a contrary opinion, but we fail to see any logic in its argument from that fact.

III

In its second point[3] Sierra devotes considerable space to the proposition that restitution can be enforced only by a Court. This is not in issue. We assume that if there is actually a right to restitution in this case such right may be enforced by an appropriate court. However, we do maintain that any right to restitution depends upon whether the former rate, the basis for the restitution claim, was in fact and law contrary to the public interest under the Federal Power Act. We further maintain that a court will not and should not make the initial determination of whether such a conflict with the public interest existed. This is a matter which must first be determined by the appropriate administrative agency—in this case, the Federal Power Commission. In view of the action which Sierra has instituted in the Federal District Court of the Northern District of California for the purpose of seeking restitution,[4] it is manifestly proper that the PG&E ask the Commission to make a determination as to whether any conditions exist to negate any right to restitution.

Exhibit "A" attached hereto is a copy of our Notice of Motion to Stay, with points and authorities, and the Supplemental Points and Authorities in Support of Motion to Stay filed by PG&E in said action. The exhibits referred to in said notice of motion are not attached since they are already on file with, or have been served upon, the Commission. Said

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[3] Sierra's Answer, p. 6.

[4] See Sierra's Answer, Ex. "A".

Exhibit "A" contains a full discussion of the applicable principles of law and we respectfully refer the Commission thereto.

IV

Sierra's struggle to explain or distinguish the *Atlantic Coast Line* case[5] demonstrates the difficulties of its position.

Here again it prefers the dissenter's point of view to the majority. In fact, Sierra relies upon the dissent as authority for instituting its action in the Federal District Court.[6] Sierra's explanation amounts to saying that the result of the *Atlantic* case is due to a procedural quirk, a point of view which was not likely to have been entertained by Justice Cardozo who wrote the majority opinion. The *Atlantic* case is best explained, not on Sierra's theory, but in the words of the Supreme Court itself in *United States v. Morgan*[7], which describes the *Atlantic* case in explict terms as follows:

> "The final result of the litigation was that the railroads
>
> [2782]
>
> were permitted to collect and retain the // higher rates for a period during which there was no lawful order of the Commission superseding the state commission rates. There, as here the administrative agency could prescribe rates only for the future, and the higher rates exacted between the date of the first order and the second were without the sanction of a valid order. But there, as here, the first administrative order was not a nullity. . . Though voidable, it could not be ignored without incurring the penalties for disobedience inflicted by the applicable provisions of the statute. The

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[5] 295 U.S. 301.

[6] See Sierra's Answer, p. 10, footnote.

[7] 307 U.S. 174 (1939).

> rates did not lose their unjust and unreasonable quality in the one case, or cease to be unjustly discriminatory in the other, merely because the administrative orders in each were voidable for procedural defects or because a second order could operate only for the future. In each case the administrative agency was not without power to inquire whether injustice had been done by the earlier rate, and the court, called on to ascertain, according to equitable principles, the rights of the parties with respect to payments made under the voidable order, could take into account the subsequent determination of the administrative agency as the basis of its action."[8]

When it is recalled that *United States v. Morgan* was decided on the express assumption that the Secretary of the Interior could not promulgate a rate order as of the date of the Secretary's original order and could not make an order for the payment of money,[9] the parallel with the present situation before the Commission is complete. In neither case can the administrative agency directly put into effect its determination. In both cases there is a court proceeding in which equity can be done—there by disposition of impounded money, here by denying or granting restitution.

Nor can the Morgan case be distinguished, as Sierra attempts to do, on the ground that the money there was impounded. It was merely Sierra's failure to obtain a stay that resulted in the money being collected by PG&E rather

than being impounded during // the course of litigation. Certainly this failure does not improve Sierra's position.

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[8] 307 U.S. pp. 195, 196.

[9] 307 U.S. 174 at 191, 192.

In any event, the Supreme Court has already stated that the impounding in *Morgan* was immaterial to the decision reached.[9a]

In its endeavor to find some means of distinguishing the present situation from the *Atlantic* case, Sierra argues that that case does not establish any general principle. As a matter of fact, the rule in the *Atlantic* case is based on sound principles of general application. This is brought out by the broad language of Justice Stone in the *Morgan* case above cited, when he says:

> "* * * in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim"[10]

[2784]

The "plainly indicated object" of the portion of the Federal Power Act with which we are here concerned is the maintenance of just and reasonable rates, i.e., rates consistent with the public interest. Thus in the present case it should be the function of the Commission to determine whether the old rate was contrary to the public interest and it should then be the function of the court to determine whether there is any right to restitution. Sierra has no better claim to obtain power at a rate so low as to be adverse to the public interest than PG&E would have to a rate so high as to be adverse to the public interest.

[9a]. See *Addison v. Holly Hill Co.*, 322 U.S. 607, 621.

[10]. 307 U.S. 174, at 191.

The equitable approach which the Supreme Court has enjoined upon the courts in determining whether restitution is appropriate seeks to serve the public interest as far as possible despite the delays inherent in the judicial process. Thus in the *Morgan* case, the consumers were given the benefit of a lower rate order which was originally invalid but was subsequently found to be factually justified. The other side of the picture is found in the *Atlantic* case where the utility was given the benefit of a higher rate order originally invalid, but subsequently found to be factually justified. To put the matter in another way, the Supreme Court has refused to compound the hardships of the time lag in the regulatory process by adding to it a "judicial lag".

The equitableness of the results achieved by the *Atlantic* and *Morgan* cases can not be disputed. It is immaterial that the Sierra rate was embodied in a contract. PG&E

[2785]

does not seek to // repudiate that contract; it seeks to show that the rate has become contrary to the public interest and the statutory requirement of the Federal Power Act that all rates charged by public utilities shall be just and reasonable.

V

We turn next to the issues which we have requested the Commission to consider upon a reopening of the proceeding. Sierra has, by offering four exhibits, attempted itself to reopen the proceeding and argues that on the basis of this evidence the Commission should, in effect, summarily dismiss the case. There is no merit in Sierra's contentions.

We will show in the reopened proceeding that the actual out-of-pocket dollar costs which PG&E could save by giving up or abandoning all service to Sierra would exceed by about $800,000 per year the revenue which PG&E would receive from Sierra under the 1948 contract rate. That such an out-of-pocket loss is financial impairment adverse to the public interest has already been conceded by Sierra. At page 63 of its brief to this Commission upon submission of the original case, Sierra states its second point as follows:

> "It is in the public interest that the present contract be maintained in full force and effect, at least as long as Pacific earns more under the contract rate than it would save if Sierra's business were lost or abandoned."

On page 64 of the same brief, Sierra states:

> "The only harm such a contract could do from the standpoint of the public interest would arise either if the burden of low rates were borne by other consumers of the utility, or if the rates were so low that it would be more profitable to the utility to abandon the business and lose its investment than to continue rendering the service at those rates."

PG&E estimates that the actual dollar saving which would result from eliminating the Sierra service would amount to about $2,700,000 per year, whereas the revenue from Sierra under the contract rate would be only about $1,900,000, based on 1955 loads. The difference between these two figures, or $800,000 must be obtained from Sierra or from other customers if PG&E is to continue to fulfill all its service obligations.

The foregoing figures do not include the outlay of over $1,000,000 which PG&E is currently making in order to increase transmission capacity from Drum to Summit to serve Sierra as contemplated in the service contract. This additional investment would be completely unwarranted and contrary to the public interest if it were to result simply in increasing an out-of-pocket loss already high.

The effect on the public interest of an annual out-of-pocket loss of $800,000 is not eliminated simply because percentagewise the amount is small in relation to overall earnings of the Company from all of its activities including

[2787]

service to more than // 1,700,000 electric customers and more than 1,400,000 gas customers. This Commission can consider only the case which is actually before it, and must be guided by the public interest as it appears in that case. If the public interest in having the utility secure adequate revenues to cover the out-of-pocket costs necessarily incurred in rendering and maintaining service can be ignored in this case, then it must be ignored in every case which involves only a small part of the utility's business and the utility would have to be on the verge of bankruptcy and in an irretrievable position before the Commission could act. It must be clear that the Commission has jurisdiction not only over the "last straw" but over each straw which may contribute materially to such a result. Any other conclusion would leave the Commission impotent to perform its primary function of protecting the public interest.

That an out-of-pocket loss of $800,000 a year must inescapably be a burden upon other customers should be apparent. The dollars to cover these losses must be obtained from the only source which the utility has of obtaining dollars and this is from its customers. If Sierra does not pay these dollars some other customer's dollars must be used for that purpose, or service will necessarily be impaired. Any attempt to take those dollars away from the return which the utility must earn in order to attract the new capital necessary to fulfill its obligations to serve the expanding population and economy of California can not

[2788]

achieve its // purpose, for a lower return will result in added costs of obtaining new money and hence must ultimately be reflected in the costs to be borne by all consumers.

VI

Sierra has nothing to say on the subject of discrimination that will bear intelligent examination. The Commission held in its original opinion that the proposed rate was not discriminatory. It would seem to follow as a matter of course that a rate which is more than one-fifth lower would constitute discrimination in favor of the customer who obtained that rate. Sierra's contention that *the Commission* has decided to the contrary is entirely unsupported, despite its quotation of statements of one of the dissenting Commissioners and statements of Staff Counsel.

In its supplemental answer Sierra makes a further attempt to deal with this problem by making comparisons with certain PG&E rates charged some municipal customers for resale service. The record already shows that the higher rate proposed for Sierra is fully justified by cost differentials. The costs to serve the municipal customers are less than the cost to serve Sierra with the result that the rate of return to PG&E from service to these other customers has been consistently and materially higher than the rates of return from service to Sierra.[11] Further than this, how-

ever, // Sierra's own exhibit shows that the municipal customers to which it refers will be paying for power at substantially the higher rate proposed for Sierra before the end of 1958.

Sierra would have the Commission believe that PG&E is being inconsistent in proposing the Schedule R rate for Sierra because the seven-year contracts with the municipalities provide somewhat lower rates than Schedule R for the first three years of the contract term and PG&E has stated that performance of these contracts "will not constitute a burden upon Pacific's other consumers." There are three facts conveniently ignored by Sierra which provide a complete answer to this contention. In the first place, as already noted, the cost of service to these customers is less than costs to serve Sierra. In the second place, the contracts in question expressly permit and provide for changes in the rate so that if any general increase in PG&E's resale rate is authorized, the contract rates will be changed accordingly. Thus, these customers will bear their due portion of any increase found to be reasonable by the California Public Utilities Commission.

In the third place, it will be noted that although the rates to these municipal customers are stepped up to the Schedule R rate over a period of three years, the average rate for the term of the contract will be more than one-fifth higher than the contract rate[12] which Sierra claims to be reasonable

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[11] See Exhibit 38, comparing rates of return from PG&E resale customers over the years 1948-1952.

and nondiscriminatory. // Sierra's argument attempts to segregate the rates during the step-up period from the rate over the life of the contract. This is clearly improper. PG&E's statement that the municipal contracts are not expected to burden other customers relates to the performance of the contracts as a whole and takes into account the rate changing provisions incorporated therein.

Conclusion

Unless the Commission reopens this proceeding, it will not have decided whether the 1948 contract-specified rate was and is adverse to the public interest.

Because Sierra has initiated court proceedings to enforce an alleged right to restitution it is particularly incumbent upon the Commission as the body with primary jurisdiction, to make the determinations of fact and law which lie within its special competence so that the court may have the necessary basis for decision upon restitution.

Sierra's attempt to argue that PG&E can not show that the contract-specified rate was and is against the public interest can not stand up in the face of a showing of annual loss of $800,000. That such a loss is contrary to the public interest has been conceded by Sierra from the outset of this case.

For all of the reasons hereinbefore set forth we urge the

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[12] The municipalities were served at a rate substantially equivalent to Sierra's 1948 contract rate prior to execution of the new seven year contract.

Commission to grant the motion for reopening and further hearing.

Dated this 5th day of September 1956.

Respectfully submitted,

F. T. Searls
John C. Morrissey
Robert E. May
Attorneys for
Pacific Gas and Electric Company

* * * * * * *

[2792]

EXHIBIT A

In the United States District Court for the Northern District of California, Southern Division

SIERRA PACIFIC POWER COMPANY, *Plaintiff,* vs. PACIFIC GAS AND ELECTRIC COMPANY, *Defendant.*	Civil No. 35591

NOTICE OF MOTION TO STAY

PLEASE TAKE NOTICE that on the 20th day of August, 1956, at 9:30 a.m., or as soon thereafter as counsel can be heard, at the United States Courthouse, Room 258, Post Office Building, Seventh and Mission Streets, San Francisco, California, defendant will move the above entitled Court to stay further proceedings in the above entitled matter and grant defendant the following additional time within which to make any pleading, motion, or other response to the complaint: Thirty (30) days after the Federal Power Commission makes its final determination with respect to the questions raised in defendant's motion "for reopening [2793] and further hearing" now pending before said Commission, a true copy of which motion is annexed hereto as Exhibit A.

Said motion to stay will be based upon the papers on file herein, and the Exhibits and Points and Authorities filed herewith.

Dated: August 2, 1956.

F. T. SEARLS
FREDERICK W. MIELKE, JR.
MALCOLM A. MACKILLOP
Attorneys for Defendant

Points and Authorities

I

Where a Restitution Action Turns Upon an Issue Yet to Be Decided by an Administrative Agency, the Action Cannot Be Entertained.

Although the complaint is in three counts, it is apparent from the facts alleged that the first two counts are simply variations of the restitution cause of action attempted to be alleged in Count III. A suit to recover money paid under compulsion of an invalidated legal proceeding is an action for restitution governed by equitable principles. It cannot be converted by allegations of the pleader's own legal conclusions into an action for breach of contract, fraud, negligence, conversion, or any other cause of action.

[2794]

Atlantic Coast Line R. Co. v. Florida, 295 U. S. 301, 310 (1935). ("The question no longer is whether the law would put him in possession of the money if the transaction were a new one.")

Wilson Cypress Co. v. Atlantic Coast Line R. Co., 109 F.2d 623, 627 (5th Cir. 1940), cert. denied 310 U. S. 653. ("Though legal in form the grounds of plaintiffs' actions here are identical with those in the restitution proceedings.")

City of Texarkana v. Louisiana Gas Co., 118 F.2d 289, 291 (5th Cir. 1940), cert. granted 314 U. S. 591, vacated on stipulation 315 U. S. 780. ("The rates collected were collected under a bona fide claim of right and were not extortions.")

Covert v. Nashville etc. Ry., 208 S. W. 2d 1008, 1012 (Tenn. 1948). ("No malfides, fraud, unconscionable or inequitable conduct can be charged to the railway company [for collecting rates in accordance with the invalid I.C.C. order].")

Redwood Hotel v. Korbien, 80 Atl. 2d 28, 29-30 (Md. 1951). ("[L]iability . . . is not founded upon any supposed wrong on the part of the appellee in enforcing the judgment pending appeal, but on the ground that in equity and good conscience he ought to restore. . . .")

As a suit for restitution, which is all the present action can be, the complaint does not state a cause of action. For when the right to restitution depends upon some administrative determination, an action for restitution does not lie until the administrative determination is made.

Morgan v. United States, 304 U. S. 1, 26 (1938).

United States v. Morgan, 307 U. S. 183 (1939).

United States v. Morgan, 313 U. S. 409 (1941).

[2795]

Atlantic Coast Line R. Co. v. Florida, supra, 295 U. S. 301 (1941).

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U. S. 246 (1951).

General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422 (1940).

Federal Power Commission v. Interstate Natural Gas Co., 336 U. S. 577 (1949).

Atlantic Coast Line R. Co. v. Baltimore & Ohio R. Co., 16 F. Supp. 647 (D. Md. 1936), appeal dismissed 91 F.2d 1007.

St. Louis-San Francisco Ry. Co. v. Lawrence, 30 F. 2d 454 (N.D. Okla. 1927).

Indeed, when any court action must rely for its success upon a determination to be made in the first instance by an administrative agency under principles of primary jurisdiction, the Court cannot grant relief before the administrative determination is made.

St. Louis etc. Ry. Co. v. Brownsville etc. Dist., 304 U. S. 295 (1938).

General American Tank Car Corp. v. El Dorado Terminal Co., supra, 308 U. S. 422 (1940).

Addison v. Holly Hill etc., 322 U. S. 607 (1944).

Far East Conference v. United States, 342 U. S. 570 (1952).

Texas etc. Co. v. Abilene Oil Co., 204 U. S. 426 (1907).

Interstate Nat. Gas Co. v. Southern Calif. Gas Co., 209 F.2d 380 (9th Cir. 1953).

For in such cases the Court can grant relief only *in accordance with* the administrative determination.

Atlantic Coast Line R. Co. v. Florida, supra, 295 U. S. 301 (1935).

[2796]

United States v. Morgan, supra, 307 U.S. 183 (1939).

Southern Ry. Co. v. Tift, 206 U.S. 428 (1907).

Interstate Nat. Gas Co. v. Southern Calif. Gas Co., supra, 209 F.2d 380 (9th Cir. 1953).

Wilson Cypress Co. v. Atlantic Coast Line R. Co., supra, 109 F.2d 623 (5th Cir. 1940).

The complaint here presents such a case. The case cannot be decided, either for or against the plaintiff, until the Court has before it the determination of the Federal Power Commission, made in response to the remand of the United States Supreme Court in the main case,* on the question whether the contract rate for the Sierra service was so low as to be against the public interest. If it was against the public interest, Sierra will not be allowed to enforce it—by a restitution suit or otherwise.

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*See Exhibit B to the complaint.

Atlantic Coast Line R. Co. v. Florida, supra, 295 U.S. 301 (1935).

United States v. Morgan, supra, 307 U.S. 183 (1939).

United States v. Morgan, supra, 313 U.S. 409 (1941).

Addison v. Holly Hill etc., supra, 322 U.S. 607 (1944).

General American Tank Car Corp v. El Dorado Terminal Co., supra, 308 U.S. 422 (1940).

Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942).

On the other hand, of course, if the rate was not against the public interest, restitution will be allowed.

Federal Power Commission v. Interstate Natural Gas Co., supra, 336 U.S. 577 (1949).

United Gas Pipe Line Co. v. Federal Commission, 220 F.2d 706 (5th Cir. 1955), cert. denied 350 U.S. 821.

State Corp. Com'n. of Kansas v. Federal Power Commission, 215 F.2d 176 (8th Cir. 1954).

Bell v. United States, 49 F. Supp. 505 (E.D. La. 1943).

In a word, the suit here is premature. Until the Federal Power Commission acts in response to the mandate of the Supreme Court, it will not be known whether a cause of action for restitution exists. The answer to the complaint, or any other response on the part of the defendant, necessarily depends upon the outcome of the pending motion for further proceedings before the Commission.

We turn to a consideration of the particular facts of this case and the proceedings already had before the United States Supreme Court.

II

The Facts Here, and the Rulings of the Supreme Court in the Main Proceeding, Show This to Be an Action Which Cannot Presently Be Maintained.

(a) *The Nature of the Present Case.*

As shown by the complaint, the present dispute is an outgrowth of a Federal Power Commission rate proceeding in which the F.P.C. ordered an increase in the rate for electric service rendered Sierra by Pacific under a certain service contract. Sierra paid the higher rate, but sought a review of the Commission's order in the Court of Appeals. The Court set aside the rate order and ordered the Commission to terminate the rate proceeding (*Sierra Pacific Power Co. v. F.P.C.,* 223 F.2d 605 (D.C. Cir. 1955), as modified ...... F.2d ....*). On certiorari, the United States Supreme Court affirmed the order setting aside the rate order (*F.P.C. v. Sierra Pacific Power Co.,* .... U.S. ...., 100 L.Ed. (Advance) 300, see also Exhibit B to complaint herein).

Unlike the Court of Appeals judgment, however, the Supreme Court judgment did not order that the rate proceeding be terminated. Nor did it order that restitution be made by Pacific of any portion of the amounts collected from

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*The modified decision (changing the form of remand) apparently has not yet been reported in the Federal Reporter. A copy of the order making the modification may be found, however, in our Petition for Certiorari, a copy of which is attached hereto as Exhibit E (Ex. E, Appendix p. 9). Also, a full report of the opinion as modified may be found in the Public Utilities Reports at 8 PUR 3rd 279.

Sierra pursuant to the invalidated Commission order. [2799] The Court recognized that it would be inappropriate to consider the question of restitution until the Commission exercised its primary jurisdiction and determined in further proceedings whether the rate specified in the contract between Sierra and Pacific was so low as to be "unlawful" under the Federal Power Act—i. e. whether it was a rate so low as to be adverse to the public interest as determined by the standards set forth in the Act.* The judgment reads as follows:

> "Whether . . . the contract rate is so low as to have an adverse effect on the public interest is of course a question to be determined in the first instance by the Commission. We shall therefore affirm the order of the Court of Appeals, with instructions to remand the case to the Federal Power Commission for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable." (Emphasis ours.)
>
> *F.P.C. v. Sierra Pacific Power Co., supra,* .... U.S. ...., 100 L.Ed. (Advance) 300, 305.

Sierra objected to this kind of remand. On motion to the Supreme Court before the judgment went down, Sierra asked that the remanding order be revised to state that, "Any amounts paid by Sierra in excess of the contract rates . . . were unlawfully collected, and P.G.&E. is [2800]

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*The Act specifies the kind of rates which are considered to be "unlawful". Among these are rates which are not "just and reasonable" or which give "undue preference or advantage" to one customer over another, or which show an "unreasonable difference" from the rates charged for other "localities" or other "classes of service". See §§ 205(a), 205(b), Federal Power Act (49 Stat. 847, 851; 16 U.S.C.A. §§ 824d *et seq.*).

obligated to make restitution of the excess payments."[*]

The Supreme Court denied the motion. Its order of denial reads as follows:

> "The respondent's motion to amend the opinion in this case is denied without prejudice to the future determination of any issues that may arise as to the right of Sierra to restitution of the excess payments made pursuant to the Commission's invalid order. The Chief Justice, Mr. Justice Black, and Mr. Justice Douglas would grant the motion."
>
> *F.P.C. v. Sierra Pacific Power Co., supra,* .... U.S. ...., 100 L.Ed. (Advance) 690.

In so acting, the Supreme Court adhered to three leading precedents cited in our arguments to the Court, *Atlantic Coast Line v. Florida, supra,* 295 U.S. 301 (1935), *Morgan v. United States, supra,* 304 U.S. 1, 26 (1938), and *United States v. Morgan, supra,* 307 U.S. 183 (1939). The three cases are landmark decisions in the law of restitution as applied to the setting aside of an administrative rate order, and they are particularly applicable here. A review of them is in order.

(b) *The Atlantic Case.*

In *Atlantic,* a railroad company had for many years maintained particular rates (the "Cummer scale") for certain intrastate Florida shippers. The rates were adopted pursuant to an agreement with the shippers and were duly approved by the Florida Railroad Commission. On complaint of an adjoining state, Georgia, the Interstate Commerce Commission enjoined the maintenance of the Cummer

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[*] Motion to amend opinion, p. 7. A copy of the motion is appended hereto as Exhibit B.

scale on the ground "that the rates were so low as to result in unjust discrimination against interstate commerce". The I.C.C. then established new and higher rates, which the shippers thereupon began to pay. The rate order was appealed, finally reaching the Supreme Court, where it was set aside as not properly supported by findings. Thereafter, the I.C.C. reopened the rate proceeding. After receiving new evidence and making a new set of findings, thus curing the defects in the prior rate order, it prescribed the same rates that it had put into effect before.

In the meantime, before the second I.C.C. proceeding was completed, the shippers "with a view to giving effect more completely to the mandate of reversal" (295 U.S. at p. 307) tried to do exactly what Sierra is trying to do here. They brought an independent action in the District Court seeking to obtain restitution of the difference between the Cummer scale and the higher rates they had been required to pay pursuant to the invalidated rate order. The District Court, acting without regard to the second Commission proceeding, endeavored to determine for itself whether the Cummer scale was so low as to be unlawful and therefore a bar to full restitution. It decided that the Cummer scale was indeed so low as to be unlawful, and that therefore, in accordance with usual equitable principles, it should not be used as the basis on which to grant restitution. Exer-

[2802]

cising what it assumed // to be its own jurisdiction in deciding how much restitution in good conscience should be granted, it decided that the lawful level of rates for the past period would have been one somewhere between the Cummer scale and the higher level fixed by the I.C.C. in the first proceeding. It then fixed what it considered would have been a "lawful" scale of rates for the past period, and ordered restitution in accordance with it.

The Supreme Court reversed. It held that the questions as to the correct rates for the past period, on which the granting of restitution in the court action depended, lay within the particular competence of the Commission to decide. Since by the time the District Court acted the I.C.C. had already "cured the defects in the form of its earlier decision" (295 U.S. at p. 311), it was clear that the Commission had effectively determined that the rates being collected pursuant to the first I.C.C. order were the lawful ones for the period in question. Accordingly, the Supreme Court held that no restitution at all should have been granted.

The parallel to our case is of course obvious. Should the Federal Power Commission in further proceedings "cure the defects in the form of its earlier decision" and make correct findings to support its prior decision, then, under the authority of *Atlantic*, no restitution will be allowable.

Sierra, however, rather than await this possible outcome, has sued at once for restitution. Sierra's effort in this respect brings us directly to the authority of the *Morgan* cases.

(c) *The First Morgan Case.*

The ruling in the first *Morgan* case (*Morgan v. United States, supra,* 304 U.S. 1, 26 (1938)), was almost identical with the ruling on Sierra's motion* in our case here. There, too, the Supreme Court was asked to rule on the question of restitution before any further administrative proceedings were commenced. The Supreme Court in *Morgan* had invalidated a rate order made by the Secretary of Agriculture fixing new rates for marketing agencies under the Packers & Stockyards Act. During the pendency of the appeal, the difference between the old and the new rates had been collected and deposited in court. In a move parallel to that taken by Sierra on its recent motion to the Supreme Court, a petition for rehearing was filed with the Supreme Court asking that the Court decide *at that time* the disposition that should be made of the impounded funds. The Supreme Court rejected the petition, holding in sum that the question as to the proper disposition of the funds was premature, inasmuch as it was not yet known "What further proceedings the Secretary may see fit to take in the light of our decision" (304 U.S. at p. 26).

(d) *The Second Morgan Case.**

The second *Morgan* case, a sequel to the one just reviewed, is perhaps the leading application of the doctrine laid down in *Atlantic.* It is, moreover, a complete answer to Sierra's apparent notion that it can escape the force of *Atlantic* if

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it persuades this Court to act before the // Commission does. After the opinion in the first *Morgan* case became final, the Secretary of Agriculture reopened the rate proceedings. Some of the parties, without waiting for any conclusions to be reached by the Secretary in the new proceedings, moved the District Court to order that the impounded funds be distributed in accordance with the old rates. The District Court granted the motion. It reasoned that, since the Secretary in the new proceedings could prescribe rates only prospectively, the old rates necessarily were enforceable up to the time the Secretary fixed new rates. To distribute the funds in accordance with a future determination by the Secretary as to the fair rates for a *past* period, the Court reasoned, would be to allow the Secretary to engage in retroactive rate-making—something expressly prohibited by the Packers & Stockyards Act.

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*Motion to amend opinion, Exhibit B attached.

The Supreme Court reversed. Relying on *Atlantic,* it held that the District Court should have awaited the outcome of the new administrative proceedings by the Secretary and should then have made distribution of the funds in accordance with the determination of the Secretary properly made in the administrative proceedings. We quote:

> "A proceeding is now pending before the Secretary in which, as we have seen, he is free to determine the reasonableness of the [past] rates. His determination . . . will afford the appropriate basis for action in the district court in making distribution of the fund in its custody. *Atlantic Coast Line Co. v. Florida, supra,* 312-313, 317."
>
> *United States v. Morgan, supra,* 307 U.S. at p. 198.

[2805]

The Court observed further that using retrospective findings of an administrative tribunal in such a way as to provide the basis for deciding the restitution question was not retroactive rate-making, as contended, but was simply the orderly process by which court and administrative agency should work together. Although under the Act the administrative agency could not make rates retroactively, it did not mean that a court should not make use of the agency's special competence in deciding issues on which the right to restitution depended—i.e. whether enforcement of the past rates would be in accordance with the public policy set forth in the regulatory act.

(In a third and final *Morgan* case, the Supreme Court affirmed the subsequent action of the District Court in distributing the impounded funds in accordance with the findings of the Secretary in the new proceedings. See *United States v. Morgan, supra,* 313 U.S. 409 (1941).)

(e) *The Decision of the Supreme Court in the Main Proceeding Here.*

In our own case, there can be little doubt that the Supreme Court had the *Atlantic* and *Morgan* cases in mind when it remanded the case for "further proceedings" before the Commission and rejected Sierra's motion for restitution. The form of the remand allowing "further proceedings" was directly responsive to the third question presented to the Court on our Petition for Certiorari, where we relied upon *Atlantic* for a reversal of the ruling of the Court of

Appeals as to the form of remand (Pet. // for Cert. pp. 2, 20-23).* Later, in opposition to Sierra's motion for restitution, we cited as the governing authorities not only *Atlantic* but also the *Morgan* cases as being especially applicable (Br. in Opp. pp. 3, 5).** As can be seen, the question as to the proper form of remand was squarely presented to the Court and plainly decided.

The deliberateness of the Court's decision as to the proper form of remand is further shown by the form of remand used by the Court in the companion case decided the same day as ours, *United States Gas Pipe Line Co. v. Mobile Gas Service Corp.,* .... U.S. ...., 100 L.Ed (Advance) 291. *Mobile* involved virtually the same basic issues as our case, and the decision in our case was made to rest upon the decision reached in *Mobile.* The two cases, however, came to the Court in different factual settings. Accordingly, the form of judgment rendered in each was different. Whereas in our case no restitution was ordered but the case remanded for "further proceedings", the Court in *Mobile* directly ordered restitution. The last sentence of the *Mobile* opinion reads as follows:

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*A copy of our Petition for Certiorari is appended as Exhibit E. As we noted earlier (p. 7 above), the remand in the Court of Appeals decision, as modified, did not allow "further proceedings" but ordered the rate proceeding to be terminated.

**A copy of our Brief in Opposition to Sierra's motion is appended as Exhibit C. A copy of Sierra's reply thereto is appended as Exhibit D.

> "Any amounts paid by Mobile in excess of the contract rates on the basis of the erroneous order of the Commission were therefore unlawfully collected, and
>
> [2807]
>
> United is obligated to make // restitution of the excess payments. Cf. *Baltimore & Ohio R. Co. v. U.S.,* 279 U.S. 781 . . ."
>
> *United States Gas Pipe Line Co. v. Mobile Gas Service Corp., supra,* ...... U.S. ......, 100 L.Ed (Advance) 291, 300.

It was the kind of judgment in *Mobile* which Sierra on its motion asked the Court to impose. In fact, Sierra stressed the point that it was seeking the same form of judgment as was rendered in *Mobile* (see Sierra's motion, pp. 6, 7, 11, Exhibit B hereto). It is clear, therefore, that the Court intended that a different procedure should be followed in the two cases with respect to the question of restitution.

Having failed to persuade the Supreme Court to allow the restitution question to be decided in advance of "further proceedings" by the Commission, Sierra has now turned its efforts toward an attempt to persuade this District Court to do so—and in a proceeding exactly like that condemned by the Supreme Court in *Atlantic* and very similar to that condemned in the second *Morgan* case. The attempt, we submit, must fail—not only because of applicable precedents, but also because the "law of the case" has been plainly laid down by the Supreme Court on Sierra's own unsuccessful motion. Manifestly, the question of restitution cannot properly be decided until after the Federal Power Commission acts in response to the mandate of the Supreme Court. By the same token, Pacific should not be required to make any pleading, motion, or other response to the complaint until the Commission makes its final determination on the questions raised by the pending motion for further proceedings before it.

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[Title of Court and Cause Omitted]

SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STAY

After the Points and Authorities were prepared in support of our Motion to Stay herein, we were served with the attached Complaint of Sierra Pacific Power Company in a new proceeding (Docket E-6697) before the Federal Power Commission. This new proceeding before the Commission emphasizes the need for the stay.

As will be noted, the new Commission proceeding is grounded upon the proposition that Pacific's collection of the increased rate authorized by the Commission's order of June 16, 1954, is unlawful because "the rate [authorized by the Commission] was and has been declared unlawful by the Supreme Court. . . ." (attachment, p. 5). Although Sierra is

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quite in error as to what the Supreme Court // declared*, the significant point is that the Commission now has before it a second proceeding in which the question of the lawfulness of the very rate involved here is at issue. Principles of primary jurisdiction again dictate that the Court in the

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*The Court neither declared the contract rate lawful nor the increased rate unlawful, but very carefully avoided doing either. It declared that the question of lawfulness was "of course a question to be determined in the first instance by the Commission", and remanded the case to the Commission "for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable." (*F.P.C. v. Sierra Pacific Power Co.*, ... U. S. ...., 100 L.Ed. (Advance) 300, 305.) The intentional avoidance of any declaration as to the lawfulness of either the old or new rate is further shown by the Court's refusal to declare that the increased amounts collected by Pacific under the new rates were "unlawfully collected", as Sierra had asked by its motion to amend the Supreme Court's opinion (Exhibit B to Motion to Stay, p. 7).

present action stay its hand until the Commission's determination is made. The correct course is as directed by the Supreme Court in *General American Tank Car Corp. v. El Dorado Terminal Co.,* 308 U. S. 422, 433 (1940):

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination . . . ."

F. T. Searls
Frederick W. Mielke, Jr.
Malcolm A. MacKillop
Attorneys for Defendant

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

In the Matter of
PACIFIC GAS AND ELECTRIC COMPANY
SIERRA PACIFIC POWER COMPANY

Docket No. E-6482
Docket No. E-6697

ANSWER TO MOTION TO FILE CLOSING SUBMISSION

Pacific Gas and Electric Company asks leave to file a "Closing Submission" in response to Sierra's reply, on the alleged ground that "the moving party is customarily expected to close the arguments by making a reply to any opposition". It is respectfully submitted that nothing could be plainer than that under the Rules of Practice and Procedure of the Commission the moving party has no right whatever to make a reply to any opposition. This practice is, of course, governed by § 1.12 of the Rules, which provides for the filing of written motions pursuant to the requirements of §§ 1.15 to 1.17, inclusive, and gives any other party ten days to answer or object. Thus, under the Rules, it is the party objecting to a motion, and not the moving party, who is "customarily expected to close the arguments". Having been granted one opportunity // to reply to Sierra's answer to its motion, PG&E surely is not entitled to a second opportunity. If this motion were granted, it would seem that under the Commission's Rules, Sierra would be entitled to file a further reply, and so *ad infinitum.*

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And no doubt this is PG&E's purpose. For its proposed "Closing Submission", like its principal Submission, is clearly intended, by collateral excursions into issues which are not before the Commission, to cause delay and conceal

PG&E's inability to meet the only issue which was remanded to the Commission: whether or not the contract rate is now against the public interest. On this issue PG&E's proposed "Closing Submission" is as barren as its predecessor. It still indulges in shrill lamentations as to the "possible destruction of the Company's credit" (p. 23) if it should lose this litigation without even attempting to explain its representation that it was not involved in any litigation except such as was "considered routine to the Company's operations", on the basis of which it has just sold $36,000,000 worth of stock to the public (Sierra Answer, p. 18a); it still asserts that the low contract rate will cast a burden on its other customers without coming to grips with the conclusive demonstration in our original answer that any "loss" resulting from this contract will be borne exclusively by its stockholders (Sierra Answer, pp. 14-17); and it still asserts that the low rate is unduly discriminatory with respect to its other customers without showing that

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those customers // will be affected by it in any way (Sierra Answer, pp. 14-17).

It was in order to reply to these contentions that PG&E requested and obtained permission to file its original Submission. Having demonstrated its inability to do so, it is obvious that the sole purpose of its present attempt to file a second "Submission" is to further obfuscate the true issues and to delay as long as possible the final determination of this controversy, no doubt in the hope that by wearing Sierra down it may force it to compromise an issue which has already been decided in its favor by the Supreme Court of the United States. It is respectfully submitted that PG&E's motion to file a further Submission is without merit and should be denied.

However, if the Commission should nevertheless deem it appropriate to grant PG&E's motion, then Sierra respectfully requests that it be permitted to add two footnotes, copies of which are attached hereto, to its Reply filed with the Commission on November 15, 1956. The subject matter of these footnotes was included in the original drafts of the Reply, but was omitted in the course of editing on the ground that, as this was assumed to be the final document to be submitted, the footnotes did not appear necessary. However, if PG&E's proffered "Closing Submission" is accepted by the Commission, the subject matter of the

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footnotes does become // material, and it is respectfully submitted that in that event, they should be added in the interests of clarity, and in order to avoid any misunderstanding of Sierra's position.

It is therefore respectfully requested that PG&E's motion be denied, and that, if it be granted, the Commission instruct the Secretary to substitute new pages 21 and 55 as enclosed herewith, which include the proposed footnotes, for the pages bearing those numbers now in Sierra's reply.

Dated: December 7, 1956.

Respectfully submitted,
WINTHROP, STIMSON, PUTNAM & ROBERTS
By William C. Chanler
Attorneys for Sierra Pacific Power Company
40 Wall Street
New York 5, New York

William C. Chanler
J. Philip Bahn
Of Counsel

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; William R. Connole and Arthur Kline.

In the Matters of

PACIFIC GAS AND ELECTRIC COMPANY Docket No. E-6482
SIERRA PACIFIC POWER COMPANY Docket No. E-6697

Order Permitting Further Filings and Consolidating Proceedings

(Issued September 7, 1956)

There are presently pending before this Commission two related, but separately docketed, matters arising from the prior action of this Commission in approving an increase in the filed rates and charges of the Pacific Gas and Electric Company (PG&E), for wholesale electric power and energy service rendered to the Sierra Pacific Power Company (Sierra), which was set aside upon judicial review.[1]

In one, PG&E alternatively seeks: (A) a reopening of the prior rate proceeding before this Commission in Docket No. E-6482 to receive evidence, hear argument and make findings material to certain issues set out in its motion therefor filed June 11, 1956; chiefly, whether, within the meaning of the decision of the Supreme Court noted herein (i) PG&E's 1948 contractual rates and charges to Sierra were prior to, on and after June 17, 1954, so low as to have an adverse effect upon the public interest; (ii) PG&E's increased rates and charges to Sierra previously approved by the aforesaid opinion and order of this Commission were in excess of a just and reasonable rate for service to Sierra on and after June 17, 1954; and (B) leave to file factual and legal support for the aforesaid request for reopening the Commission proceeding in Docket No. E-6482. PG&E's request for leave to make a further filing in support of its aforesaid motion was made through written communication of its counsel on July 26, 1956, following the filing by Sierra of two written responses on June 28, 1956 and July 18, 1956, generally opposing PG&E's motion for

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[1] That prior action by the Commission was reported by opinion and order issued June 17, 1954 *In the Matter of Pacific Gas and Electric Company,* Docket No. E-6482. It was set aside by opinion and order of the United States Court of Appeals For the District of Columbia Circuit entered February 24, 1955, *Sierra Pacific Power Co. v. FPC,* CADC No. 12430, reported 223 Fed 605. The action of the Court of Appeals was sustained by opinion of the United States Supreme Court dated February 27, 1956, *FPC v. Sierra Pacific Power Co.* Nos. 51 and 53, reported 350 U.S. 348.

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reopening the // Commission proceeding in Docket No. E-6482, and requesting that said motion be denied without further proceeding. On August 2, 1956, Sierra, also by written communication of its counsel, alternatively joined in PG&E's additional request for leave to make a further filing on condition that it, (Sierra), be afforded an opportunity for reply.

The other matter presently pending before this Commission involves a formal complaint of Sierra, filed on July 23, 1956, Docket No. E-6697, against alleged unlawful action by PG&E in continuing to demand from Sierra the increased rates and charges previously approved by the aforementioned June 17, 1954 opinion and order of the Commission. On August 28, 1956, PG&E filed a written response to Sierra's complaint requesting alternatively that it be dismissed or that such proceeding be consolidated with the currently pending matter in Docket No. E-6482.

Upon consideration of the foregoing, it is the view of this Commission that, (1) the orderly conduct of the aforedescribed matters currently pending before the Commission in Docket Nos. E-6482 and E-6697, will best be served by the further submission at this time of any additional factual or legal showings which PG&E or Sierra may wish to present in support of their respective positions, and (2) the aforedescribed matters currently pending before the Commission involve common issues of law and fact. Accordingly, it is necessary and appropriate to carry out the provisions of the Federal Power Act, that the requested leave for further filings by PG&E and Sierra be granted as hereinafter ordered and that the complaint proceeding currently docketed as No. E-6697 be consolidated for all purposes with No. E-6482 as hereinafter further ordered.

The Commission *orders*:

(A) PG&E be, and it hereby is, permitted within thirty days from the issuance of this order, to file with the Commission in accordance with the requirements of § 1.15-1.17 of the Commission's Rules of Practice and Procedure, a showing of any facts and a statement in writing of any further argument it may wish to adduce in support of its motion filed June 11, 1956, Docket No. E-6482 or its answer filed August 27, 1956, Docket No. E-6697; provided, however, if PG&E shall make any such filing, it shall show in what particulars, if any, the aforementioned 1948 contractual rates and charges were, prior to, on and after June 17, 1954, or presently are so low, after giving proper effect to any benefits accruing to PG&E through the retention of its Sierra business, as to adversely affect the public interest by impairing its financial ability to continue service as a public utility, by casting an excessive burden upon any other of its electric utility customers, by being unduly discriminatory with respect to any other of its electric utility customers, or in any other way being adverse to the public interest within the meaning of the aforementioned opinion of the Supreme Court. Thereafter, Sierra be and it hereby is permitted, within a period of twenty additional days, to file with the Commission in accordance with the requirements of § 1.15-1.17 of the Commission's Rules of Practice and Procedure, any showing of facts or statement in writing of any further argument it may wish to adduce in response to any filing by PG&E pursuant to this order or in support of its answer or supplemental answer filed June 28, 1956 and July 18, 1956, Docket No. E-6482 or its complaint filed July 23, 1956, Docket No. E-6697.

(B) The proceeding currently docketed in No. E-6697 be, and it hereby is consolidated for all purposes with the currently pending matter in Docket No. E-6482.

By The Commission.

/s/ Leon M. Fuquay
Leon M. Fuquay,
Secretary.

[No Number]

Before the

FEDERAL POWER COMMISSION

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY	Docket No. E-6482

Supplemental Motion of Pacific Gas and Electric Company for Reopening and Further Hearing

* * * * * * *

[2817]

[Title of Commission and Cause omitted]

SUPPLEMENTAL MOTION OF PACIFIC GAS AND ELECTRIC COMPANY FOR REOPENING AND FURTHER HEARING

In its Motion for Reopening and Further Hearing already on file herein, Pacific Gas and Electric Company, hereinafter called PG&E, asked that this proceeding be reopened to make certain findings relevant to the question whether the rate under Schedule F.P.C. No. 3 was so low as to have an "adverse effect on the public interest" under the decision in *F.P.C. v. Sierra Pacific Power Co.,* 350 U.S. 348.

PG&E hereby makes this supplemental motion in accordance with the following:

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1. During the previous proceeding before the Commission, Sierra took the position that the filing by PG&E on February 2, 1953, of its proposed new rate schedule under Section 205(d) of the Federal Power Act should be rejected because the contract between Sierra and PG&E precluded such a filing. Sierra argued that the rate specified in the contract was intended by the contracting parties to be a firm rate for the fifteen-year minimum life of the contract and that the only way such a firm contract rate could be changed was by a proceeding under Section 206(a).

2. In answer to this argument, PG&E contended that the contract rate was not meant to be firm for fifteen years or longer but was meant to be subject to change upward or downward to reflect changes in PG&E's costs of service. Much evidence was adduced by both sides on this issue.

3. The Commission, however, considered it unnecessary to decide this issue and made no finding on it. It ruled that

any contract rate, even a fixed one such as Sierra contended this one was, could be superseded by a filing under Section

[2819]

205(d). The Commission then went to // the merits of the case, found that the old rate had become unreasonably low, and issued its order allowing the increased rate.

4. As a party "aggrieved" by the Commission's order, Sierra sought a judicial review. On such review the Supreme Court held that the Commission's ruling that contracts could be superseded by filings made under Section 205(d) was erroneous and that the Commission's finding of unreasonableness of the old rate was erroneous because not based on appropriate standards for a firm contract rate. Although the Court had to *assume* for purposes of its opinion that the contract was for a firm rate, the Court did not *decide* that such was the nature of the rate. The Court merely disposed of the ruling that it made no difference whether or not the contract was for a firm rate (by saying in effect that it *did* make a difference in the standard to be applied for changing the rate) and sent the matter back to the Commission. It left undetermined the same question the Commission had left undetermined—the true nature of the contract rate.

5. Since Sierra was the party appealing from the Commission's order and since the Commission had made no

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findings on PG&E's contention before the Commission, PG&E had no basis for insisting upon a court determination of its contention. Thus, PG&E's contention before the Commission (set forth in paragraph 2 above) has yet to be decided.

6. The Supreme Court has set aside the Commission's

order and the case has been remanded "for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable." Under this remanding order the Commission may now decide the issues raised by PG&E's contention as to the nature of the contract rate.

7. In addition to the evidence already before the Commission[1] upon which PG&E will rely to support its contention that the contract rate was never intended by the parties to be a firm rate, PG&E deems it important to this Commission's complete understanding of this issue that additional evidence be presented in support of that contention, including the testimony of N. R. Sutherland, President of PG&E,

who personally conducted the concluding // negotiations for the contract. This additional evidence will show that, as a consideration for the execution of the contract in the particular form it was executed, Sierra expressly represented to PG&E that it fully understood that the rate specified in the contract was subject to change upward or downward in accordance with changes in PG&E's standard resale tariff which was adopted as the contract rate, and that, in reliance upon said representation of Sierra, PG&E executed the contract in a form which did not state the basis on which the rate specified in the contract could be changed.

WHEREFORE, PG&E prays, in addition to the prayer of its original Motion for Reopening and Further Hearing on file herein, that this Commission reopen this proceeding to receive additional evidence, hear further argument, and make findings material to PG&E's contention as to the meaning of the contract filed by PG&E as a tariff schedule in 1948 and approved by the Commission, with certain important qualifications, August 5, 1948.

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[1] See a review of this evidence set forth at pp. 16-40, Op. Br. of PG&E, and pp. 5-25, Reply Br. of PG&E, both in Docket E-6482.

Dated this 10th day of October, 1956.

Respectfully submitted,

PACIFIC GAS AND
ELECTRIC COMPANY
By N. R. SUTHERLAND
President and General
Manager

F. T. Searls
John C. Morrissey
Robert E. May
Attorneys for Pacific Gas and Electric Company

[2822]

State of California
City and County of San Francisco—ss

N. R. Sutherland, being first duly sworn deposes and says that he is the President and General Manager of Pacific Gas and Electric Company, the moving party in the attached Supplemental Motion, that he has read the Supplemental Motion and knows the contents thereof, and that the same are true to the best of his knowledge and belief.

N. R. SUTHERLAND

Subscribed and sworn to before me
this 10th day of October, 1956
MARIE H. STANLEY
Notary Public in and for the City
and County of San Francisco
State of California
My Commission Expires: 11-22-59

* * * * * * *

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UNITED STATES OF AMERICA

Before the

FEDERAL POWER COMMISSION

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY SIERRA PACIFIC POWER COMPANY	Docket No. E-6482 No. E-6697

Submission of Pacific Gas and Electric Company

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APPENDICES

Appendix "A"

F.P.C. Order of August 3, 1948 allowing Rate Schedule F.P.C. No. 3 to take effect as of January 1, 1948.

Appendix "B"

Notice of Motion to Stay, Points and Authorities and Supplemental Points and Authorities in Support of Motion to Stay filed by P. G. & E. in *Sierra Pacific Power Company v. Pacific Gas and Electric Company,* U. S. District Court of the Northern District of California, Southern Division

Appendix "C"—Financial Data

Schedule 1—Costs which could be eliminated by discontinuing service to Sierra Pacific Power Company compared with revenue under contract rate (FPC-3) and proposed rate (FPC-3 SUPP. 1)

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Schedule 2—Pacific Gas and Electric Company Electric Department Revenues, Expenses, Net for Return, and Rate of Return 1955 Recorded and 1956 Estimated

Schedule 3—Sierra Pacific Power Company Electric Department Estimated Rate of Return Years 1954 and 1955

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SUBMISSION OF PACIFIC GAS AND ELECTRIC COMPANY

Pacific Gas and Electric Company asks the Commission[1] to make clearly lawful the rate known as Schedule F.P.C. No. 3, Supplement No. 1. This is the rate which the Commission found lawful in its opinion No. 270 of June 17, 1954, in Docket No. E-6482. That case, which was appealed, has been remanded to the Commission with instructions to take such further proceedings, not inconsistent with the Supreme Court's opinion, as the Commission may deem desirable[2].

The remand of the Court and both P.G.&E.[3] and Sierra[4] have brought this matter again to the attention of the

Commission. P. G. & E. by its motion of June 8, 1956, has asked the Commission to reopen Docket No. E-6482 and to make findings material to the issues raised by the Supreme Court's opinion. P. G. & E. by its supplemental motion of October 10, 1956, has also asked the Commission to reopen Docket No. E-6482 in order to make findings material to P. G. & E's basic contention, yet undecided by the Commission, as to the true nature of the contract rate in question (Schedule F.P.C. No. 3). Sierra has asked the Commission by its complaint of July 20, 1956 (Docket No. E-6697) to examine the question whether P. G. & E. is presently charging an unlawful rate by charging Schedule F.P.C. No. 3, Supplement No. 1.

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[1] Federal Power Commission.

[2] *F.P.C. v. Sierra Pacific Power Co.,* 350 U.S. 348 (1956).

[3] Pacific Gas and Electric Company.

[4] Sierra Pacific Power Company.

This submission amplifies and supports P. G. & E.'s motions for reopening and further hearing in Docket No. E-6482, and its answer in Docket No. E-6697. It states briefly the facts, the issues and the argumentation bearing on the issues. The argument will show—

(a) the Commission can and should act in this matter,
(b) the contract between P. G. & E. and Sierra contemplates a changeable and not a fixed rate,
(c) the facts warrant the Commission making the findings needed to support its determination that Supplement No. 1 rates were and are lawful,
(d) Sierra has no basis for filing its complaint.

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Facts

The controversy between Sierra and P. G. & E. has reached its present stage before the Commission by a route which, for the convenience of the Commission, we shall briefly here summarize[1].

1. Negotiation of the contract and Commission approval.

Since 1923 P. G. & E. has supplied wholesale electric service to Sierra under a series of 15-year contracts. In 1948 a new 15-year contract was negotiated under which P. G. & E. agreed to sell power to Sierra at a rate equivalent to P. G. & E.'s then filed Schedule P-31 rate for intrastate resale service.[2] In negotiating the contract the parties expressly understood that the rate specified in the contract, although not designated P-31 by name, was in fact that rate and would be subject to change in accordance with changes in the P-31 rate as filed with the California Commission.[3]

The contract was filed with the Federal Power Commission and was designated by the Commission as Rate

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Schedule F.P.C. No. 3 (the two prior 15-year contracts having been designated Schedules Nos. 1 and 2, respectively). The Commission allowed the rate specified in the contract to take effect as the tariff schedule for service to Sierra, but expressly withheld approval of any other provision of the contract. The Commission's order read, in part, as follows:

> "(C) Nothing contained in this order shall be construed as constituting approval by this Commission of any . . . contract . . . affecting such service or rate . . . nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate.
>
> (D) This order is without prejudice to any findings or orders which . . . may hereafter be made by this Commission in any proceeding . . . hereafter instituted, by or against the applicant."[1]

In 1948, before the decision in *United States v Public Utilities Commission of California*, 345 US 295 (1953), it was contended that the California Commission had concurrent jurisdiction over the contract (because some of Sierra's resales of power took place in California). Accordingly, the contract was also filed with, and approved by, the California Commission. Unlike the Federal Power Com-

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1. The facts related here have either already been established in the prior proceedings in Docket No. E-6482 or will be established by P. G. & E. in further proceedings.

2. Resale service is service supplied a customer who resells the service to its customers, sometimes called "wholesale service".

3. Public Utilities Commission of the State of California.

mission, the California Commission held full hearings on

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[1] See Appendix A herein for a copy of the entire order.

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the contract and approved the contract itself, not merely the contract rate.[1]

Shortly thereafter, P. G. & E. asked the California Commission to authorize an interim increase of 6% in substantially all its rates, including the rates in its Schedule P-31.[2] When authorized, this requested interim increase of 6% would have applied, in accordance with the understanding of the parties, to the rate for service to Sierra. Sierra recognized this and specifically requested P. G. & E. to delay the application of the increase to Sierra. P. G. & E. acceded to this request, but only with the express understanding obtained from Sierra that at a later time, an increase would be made. P. G. & E. then amended its application[3] and obtained Sierra's exemption from the interim increase.[4]

2. Further increases in P. G. & E's costs of service.

After the outbreak of the Korean war in 1950, P. G. & E.

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[1] C.P.U.C. Decision No. 41537 issued April 27, 1948 in Application No. 29221, Exh. 13 in F.P.C. Docket E-6482.

[2] P. G. & E.'s Application No. 30717 filed October 19, 1949 with the California Public Utilities Commission.

[3] Amendment of application authorized by California Public Utilities Commission at hearing held December 16, 1949 on Application No. 30717 (See p. 44 of transcript of hearings, Exhibit 14, in F.P.C. Docket E-6482.)

[4] C.P.U.C. Decision No. 43972 issued March 21, 1950, in Application No. 30717, 84 PURNS 455, Exh. 18 in FPC Docket E-6482.

[2838]

found its costs of service definitely mounting and // its earnings becoming seriously impaired. In 1951, therefore, it filed with the California Commission an application for a general increase for all of its electric rates, including the Sierra rate, other contract rates, and the P-31 rate. After extensive hearings, the California Commission in 1952 granted increases in all of P. G. & E's filed rates, including the P-31 rate. The latter rate was increased to an even greater extent than requested by P. G. & E., approximately 20%, and redesignated Schedule R.[1]

With respect to the contract rates that had been negotiated with Sierra and others on the basis of the P-31 rate, the Commission took heed of the request of these customers at the hearings and allowed them to "negotiate" with P. G. & E. for increases rather than have the Commission directly order the increases under the new Schedule R. The Commission said:

> "The Commission, in considering these special contracts, is of the opinion that an opportunity should be afforded the parties [as they have requested] to renegotiate these contracts, should they so determine. It is obvious that underlying costs have increased since the contracts were negotiated. Since by this decision a new basic resale schedule is being adopted [Schedule R], opportunity should be afforded for renegotiation of these contracts in the light of the new basic resale schedule."[2]

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[1] C.P.U.C. Decision No. 47832, October 15, 1952, in Application No. 32589; 52 C.P.U.C. 111, 151; 96 P.U.R.N.S. 493.

[2] *Ibid,* 52 C.P.U.C. at p. 151, 96 P.U.R.N.S. at p. 526.

[2839]

Since the California Commission had increased the P-31 rate to the level provided in the new resale Schedule R, and since it had also withheld applying the new rate to Sierra and others to give them an opportunity (as requested by Sierra and the others) to renegotiate their contract rates "in the light of the new basic resale schedule [Schedule R]", P. G. & E. sought to negotiate with Sierra for a change in the contract rate pursuant to the original understanding of the parties as to the changeability of the contract rate.

3. Refusal of Sierra to abide by agreement.

Sierra refused even to negotiate.[1] P. G. & E. then took two steps to enforce its agreement with Sierra. Its first step was to file a petition[2] with the California Commission asking for a revision of the Sierra contract rate to bring it into line with the new Schedule R. This procedure appeared to be warranted, not only by way of obedience to the order of the California Commission, but also because *United States v. Public Utilities Commission of California*, 345 US 295 (1953) had still not been decided, and it thus still appeared // that the California Commission might have concurrent jurisdiction with the Federal Power Commission over the Sierra contract.

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As its second step to enforce its agreement with Sierra, P. G. & E. started a proceeding (Docket No. E-6482) with the Federal Power Commission under Section 205 of the Federal Power Act. Since the California Commission had changed the P-31 rate to the new Schedule R, P. G. & E. requested the Federal Power Commission to change the contract rate to the Schedule R rate.

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[1] Except for Sierra and one other, new contracts based on Schedule R have been negotiated with all of P. G. & E.'s resale customers.

[2] Application No. 34029, filed January 20, 1953 with the California Commission.

Before hearings could be had in either of the two proceedings before the Commissions, the jurisdictional decision came down in *United States v. Public Utilities Commission of California,* 345 US 295 (1953) establishing that the Federal Power Commission had exclusive jurisdiction over matters such as the service rendered Sierra by P. G. & E. Thus the effect of the California Commission's earlier approval of the 1948 contract became problematical, and the limited approval of the contract by the Federal Power Commission's order of August 3, 1948 became highly significant. Also, as a necessary consequence of the jurisdictional decision, prosecution of the proceeding before the California Commission for revision of the contract rate was dropped. The only proceeding prosecuted was the one started before the Federal Power Commission, Docket No. E-6482.

4. Proceedings before the Federal Power Commission.

At the hearings before the Federal Power Commission, Sierra changed its argument entirely from what it had been before the California Commission a year earlier. Whereas before the California Commission Sierra had consistently argued that it should be allowed to "negotiate" a change in the contract rate if a change in the filed P-31 rate were authorized,[1] it argued before the Federal Power Commission that the parties never intended that the contract rate could be changed when P. G. & E.'s standard resale rate changed, and that the rate was intended to be a firm rate fixed permanently for the 15-year minimum life of the contract. As a fixed-rate contract, Sierra argued, the rate could only be altered by a proceeding under Section 206(a) of the Federal Power Act.

In answer to this argument of Sierra, P. G. & E. urged the Commission to consider the real meaning of the agreement entered into by the parties, namely, that the contract rate was never intended by the parties to be a firm rate for the 15-year minimum life of the contract and that the long term of the contract was intended — not to guarantee

Sierra a fixed rate for 15 years or more—but, like the preceding 15-year contracts, to assure that the contract would last long enough to warrant the large investments contemplated by the parties.

The Commission, however, instead of attempting to decide the real nature of the contract rate, decided that it made no difference whether the contract was or was not one for a fixed rate. The Commission ruled that *any* contract rate, even a fixed one such as Sierra contended this one was, could be superseded by a filing under Section 205. The Commission then went to the merits of the case, found that the old rate had become unreasonably low, and issued its order allowing the higher Schedule R rate.

5. The Supreme Court decision.

As a party "aggrieved" by the Commission's order, Sierra sought a judicial review. On such review, the Supreme Court held that the Commission's ruling that contracts could be superseded by filings made under Section 205 was erroneous and that the Commission's finding of unreasonableness of the old rate was erroneous because it was not based

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1. See re *Pacific Gas and Electric Company,* Decision No. 47832, October 15, 1952 in Application No. 32589; 52 C.P.U.C. 111, 150, 96 P.U.R.N.S. 493, 525. This position of Sierra before the California Commission was, of course, fully consistent with the agreement of the parties that the rate would be subject to change in accordance with changes in the P-31 rate.

on appropriate standards for a firm contract rate. As stated by the Court, a firm contract rate could be modified only under a Section 206(a) proceeding and then only if the contract rate were found to be "so low as to adversely affect

the public interest— // as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory"[1].

Since Sierra was the party appealing from the Commission's order, and since the Commission had made no findings on P. G. & E.'s contention before the Commission as to the real nature of the contract rate, P. G. & E. had no basis for insisting upon a court determination of its contention that the contract contemplated a changeable rate, and no such determination was made.

6. The question of restitution.

When the decision of the Supreme Court came down, P. G. & E. had to decide in the first instance whether it should make any restitution of the rates it had been collecting in excess of the contract rate. P. G. & E. had been collecting the increased rates not only from the date of the Commission's order of June 17, 1954, but also from September 6, 1953, the date that the new rate had first gone into effect, under the suspension procedure of Section 205. In considering the restitution question, P. G. & E. had recourse to two aspects of the Supreme Court decision. One of these was the decision of the Court that "the Commission's order

here, *if based on // the necessary findings,* could have been effective . . . from the date of the order, June 17, 1954". (Emphasis ours.)[1] The other was that the Supreme Court had expressly ordered restitution in the companion case of *Mobile*[2], but in the Sierra case had refused[3] to do so and had instead ordered the case remanded to the Commission for "further proceedings" to permit the Commission to make the findings which would cure the defects in its order of June 17, 1954.

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[1] *F.P.C. v. Sierra Pacific Power Co.,* 350 U.S. 348, ..., 100 L.Ed. (Advance) 300, 304 (1956).

With these two features of the Supreme Court's opinion before it, P. G. & E.'s choice in deciding what to do about restitution seemed clear. It appeared, first and foremost, that the Commission was being given an opportunity by the Supreme Court to validate its defective order of June 17, 1954, by making findings in further proceedings that a proper factual basis existed for the order. Moreover, even if the order of June 17, 1954, could not be validated, the finding in further proceedings of a proper factual basis for the order would be sufficient alone to bar restitution of any amounts collected pursuant to the order from June 17, 1954,

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[1] *F.P.C. v. Sierra Pacific Power Company,* 350 US 348, ..., 100 L.Ed. (Advance) 300, 304 (1956).

[2] *United Gas Pipeline Co. v. Mobile Gas Service Corp.,* 350 U.S. ......, 100 L.Ed. (Advance) 291 (1956).

[3] There can be no doubt that the Court's refusal to order restitution was deliberate. Sierra, by special motion, asked the Court to order restitution as it did in *Mobile.* (See order of denial, *F.P.C. v. Sierra Pacific Co.,* 350 US at p. ....., 100 L.Ed. (Advance) at p. 690).

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onward. // This latter conclusion followed from the doctrine laid down in the *Atlantic* and *Morgan* cases,[1] which were relied upon by P. G. & E. in its arguments before the Supreme Court on the question of restitution. Accordingly, P. G. & E. decided that it should not make restitution of any amounts collected following the order of June 17, 1954. It refunded to Sierra only the amounts collected in excess of the contract rate from September 6, 1953 to June 16, 1954, plus 6% interest on these amounts, a total of $382,022.37.

7. The rate to be charged pending the Commission's action.

A second, but subordinate problem also confronted P. G. & E. when the Supreme Court opinion was handed down. This was the question whether to continue charging Sierra the new rate on file with the Commission or to resume charging the contract rate. Here, too, there seemed little real choice. The new rate was a filed rate and the Commission's order of March 13, 1953 and June 17, 1954, had authorized it to go into effect. The filing of the new rate had not been ordered rejected by the Commission. Nor had the Supreme Court ordered the Commission to reject it. All

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that had been done // by the Supreme Court was to order the Commission's order set aside and the case remanded for "further proceedings" to allow the Commission to determine whether a proper factual basis could be found to support its original order. Until the Commission acted, P. G. & E. considered that it had no choice but to obey the Commission's last mandate—particularly when in P. G. & E.'s opinion, a proper factual basis existed to support the Commission's order of June 17, 1954. Accordingly, P. G. & E. decided that it must continue to charge the newest rate on file with the Commission until such time as the Commission might either reject the filing of the new rate, or refuse to

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1. *Atlantic Coast Line R. Co. v. Florida,* 295 US 301 (1935); *Morgan v. United States,* 304 US 1 (1938); *United States v. Morgan,* 307 US 183 (1939), *Ibid,* 313 U.S. 409 (1941).

make findings pursuant to the doctrine in the *Atlantic* and *Morgan* cases as to the lawfulness of the rate authorized by the order of June 17, 1954.

8. The District Court proceeding.

As we have seen (Footnote 3, p. 2844) Sierra was unsuccessful in its effort to persuade the Supreme Court to order restitution in advance of an opportunity for "further proceedings" before the Commission. Nevertheless, Sierra embarked on another attempt to obtain restitution prior to the Commission's action. On June 18, 1956, it filed an action in the United States District Court for the Northern District of California[1] for restitution of the sums paid in excess

of // contract rate from June 17, 1954, onward, plus 7% interest. Pursuant to the doctrine of the *Atlantic* and *Morgan* cases,[1] P. G. & E. responded to the District Court action by filing a motion to stay the court proceedings pending the Commission's action on the Supreme Court's remand of the rate case (Docket No. E-6482).

9. Sierra's complaint before the Federal Power Commission.

Subsequently, on July 23, 1956, Sierra filed a complaint before the Commission (Docket No. E-6697) in which it claimed that P. G. & E. was charging Sierra an "unlawful" rate by continuing to charge the rate authorized by the Commission's order of June 17, 1954. By this new proceeding, Sierra thus raised in another form the same question that was raised in the main rate proceeding (Docket No. E-6482)—i.e., the lawfulness of the rate approved by the Commission's order of June 17, 1954. P. G. & E. thereupon moved for a stay of proceedings in the District Court on the further ground that the Commission now had before it a second proceeding (Docket No. E-6697) in which the question of the lawfulness of the rates in question must be determined.

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[1] *Sierra Pacific Power Co. v. Pacific Gas and Electric Co.*, Civil No. 35591, United States District Court for the Northern District of California, Southern Division.

10. Present status of proceedings.

As of this writing, the motion to stay has not yet been heard by the District Court. It is at present calendared

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1. Footnote 1, p. 2845, above.

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for hearing on October 22, 1956.

Sierra's complaint (Docket No. E-6697) has been consolidated for all purposes with the rate proceeding (Docket No. E-6482) by order of the Commission issued September 7, 1956.

[2849]

The Issues Presented to the Commission

There are now three proceedings which concern this Commission: (1) the remand of the main rate proceeding (Docket No. E-6482) by the Supreme Court, (2) the separate action in the District Court for restitution, and (3) the complaint proceeding brought by Sierra for charging of the rates in Supplement No. 1 to Schedule F.P.C. No. 3 (Docket No. E-6697, now consolidated with Docket No. E-6482 by order of the Commission issued September 7, 1956). In all of these proceedings the fundamental question is the same: what is the lawful rate to be charged Sierra for the electric service rendered it by P. G. & E.?

The answer to this basic question depends first of all on the nature of the contract rate which P. G. & E. has sought to have changed. If P. G. & E. is correct in its basic contention that the contract rate was never intended by the parties to be a firm rate, but was intended to be subject to change in accordance with usual concepts to reflect changes in P. G. & E's costs of service for resale customers, then the Commission need merely find this to be the fact. This finding would completely dispose of the case, for the Commission has already by its order of June 17, 1954, not only found the old rate "unreasonable" and the new one "reasonable" according to usual concepts, but also found the new

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rate substantially the same as the rate charged // another utility for the only other resale service rendered by P. G. & E. in interstate commerce. (P. G. & E.'s supplemental motion of October 10, 1956, for reopening in Docket No. E-6482 asks the Commission to make this finding and asks that additional evidence be taken as to the nature of the contract rate, including testimony of N. R. Sutherland, the President of P. G. & E., who participated in the final negotiations for the contract.)

On the other hand, should the Commission decide against P. G. & E.'s basic contention and also construe the Commission's approval[1] of the 1948 contract as an approval of a contract rate intended to be *fixed* for a term of more than 15 years, then the Commission must apply a new concept of rate-making to the 1948 contract. Under this view, the Commission must apply the test laid down by the Supreme Court in determining whether the contract rate may be changed. This test, as stated by the Court, requires the Commission to determine whether the contract rate "is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory". (P. G. & E.'s motion of June 8, 1956, to reopen Docket No. E-6482 asks the Commission to make this determination.)

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1. See Appendix A.

ARGUMENT

I.

The Commission Can and Should Act in this Matter.

The Supreme Court has found error in the legal reasoning of the Commission and remanded the case for "such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable". Under this remand of the Court the Commission has full power to dispose of the case in any manner that is consistent with the pronouncement of law by the Supreme Court as to the limited power of the Commission over *fixed*-rate contracts.

The Commission in its opinion did not find whether the contract was or was not for a fixed rate. It ruled as a matter of law that its power over all types of rates was the same. It is now clear from the Supreme Court's decision, however, that it makes a difference whether a contract is or is not for a fixed rate. Accordingly, it becomes important for the Commission to decide the question previously avoided as immaterial, namely, the true nature of the 1948 contract rate. This determination should be made by the Commission, not only in the light of the original contentions of the parties during the proceedings before the Commission,[1] but also in the light of the meaning of the Commission's order[2] of August 3, 1948, giving only limited approval to the 15-year contract.

If the Commission should decide in favor of Sierra's contention and rule that the contract here is one for a firm

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1. See pp. 16-40, Opening Brief of PG&E, and pp. 5-25, Reply Brief of PG&E in F.P.C. Docket E-6482.

2. The order is set out in full in Appendix A.

rate until 1971[1], then it becomes equally important that the Commission answer the other question arising under the Supreme Court's decision, i.e., whether the 1948 contract rate was "so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[2]

Even though the Supreme Court's remand states that the Commission should take such action as it deems desirable, it appears to be a clear obligation of the Commission to make the necessary determinations. To deny making them would indeed appear to be an abuse of discretion, in view of the showing, in this submission, of an $11,000,000 out-of-pocket loss to P. G. & E.[3] which would necessarily burden P. G. & E.'s other customers. As the court said in *Mississippi River Fuel Corp. v. Federal Power Commission*[4]:

> ". . . obviously, if the federal commission can arbitrarily refuse to allow in its regulated interstate rates the full and true costs of the interstate business it can

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[1] The contract provides for an extension of 15 years beyond the date of completion of a second 110,000 volt transmission line. This line will be completed during 1956.

[2] *F.P.C. v. Sierra Pacific Power Co.*, 350 US 348, 100 L.Ed. (Advance) 300, 304 (1956).

[3] See Point III, *infra*.

[4] 163 F.2d 433, 451 (1947).

[2853]

> present the company with a dilemma. If the uncompensated interstate costs be imposed upon the local intrastate business, the federal authority has, by indirection, control of those rates, even to the extent of making such business so expensive as to be prohibitive. If the uncompensated interstate costs be not imposed on the intrastate business, obviously the fairness and reasonableness of the prescribed interstate rates are fictions."

The determination of the lawful rate to charge Sierra is a matter within the primary jurisdiction of the Commission. A Court cannot entertain any action, such as Sierra's District Court action,[1] which is dependent on that rate until the Commission's determination has been made. Indeed, under the broad principles laid down in *United States v. Morgan,* 307 U.S. 183, 191, and *Addison v. Holly Hill Co.,* 322 U.S. 607, 620-622, regarding "coordinated action" by court and agency, the Commission would appear to be obligated to make the necessary determination as to the lawful rates for the past period, so that any pending action for restitution, dependent on such a determination, may proceed.[2]

It thus appears that the Commission should determine the issues presented to it, not only because it is important

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in // the consolidated proceedings in Dockets E-6482 and

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[1] *Sierra Pacific Power Co. v. Pacific Gas and Electric Co.,* Civil No. 35591, United States District Court for the Northern District of California, Southern Division.

[2] See also *Cleveland and Akron v. Hope Natural Gas Co.,* 3 F.P.C. 150, 187-188, 44 PUR NS 1, 33-35 (1942), affirmed *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591, 618 (1944).

E-6697, but also because in the Federal District Court proceeding[1] the question of restitution must be decided on the basis of the Commission's determination of these issues.[2]

In the comparable situation presented in *Thompson v. Texas-Mexican Ry. Co.,*[3] the Supreme Court said:

> "[T]he court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature. The judgment will be reversed and the cause remanded so that the case may be held pending the conclusion of appropriate administrative proceedings."

For a more complete understanding of the importance of the Commission's determination as an aid to a proper exercise of the jurisdiction in the District Court proceeding, we respectfully refer the Commission to a copy of our motion to stay filed in the District Court.[4]

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[1] Civil No. 35591, United States District Court for the Northern District of California, Southern Division.

[2] Cf. *Atlantic Coast Line R. Co. v. Florida, supra,* 295 U.S. 301 (1935); *Far East Conference v. United States,* 342 U.S. 570 (1952); *General American Tank Car Corp. v. El Dorado Terminal Co.,* 308 U.S. 422 (1940).

[3] 328 U.S. 134, 151 (1946).

[4] The "Notice of Motion to Stay", "Points and Authorities", and "Supplemental Points and Authorities in Support of Motion to Stay" filed in the District Court are reproduced in Appendix 3. The various exhibits referred to in these documents have not been reproduced, but all are in the possession of the Commission, its Staff and Sierra.

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II

The Contract Between PG&E and Sierra Contemplates a Changeable and Not a Fixed Rate.

As we have seen, one of the issues for decision by the Commission is whether the contract between Sierra and PG&E contemplated a firm rate. It is readily demonstrable that the 1948 contract is not one for a firm rate.

1. The agreement of the parties.

As the Commission well knows, it is commonplace in utility rate contracts that the rate specified in the contract is understood by the parties to be changeable in accordance with usual concepts of rate regulation, i.e., in accordance with changes in the utility's costs of service as duly found by a regulatory Commission. Such an understanding would particularly be expected in the present case where buyer and seller both were regulated public utilities. Indeed, any other understanding in the present case, where the contract was to run for an extremely long period of time (it now appears that it will run until 1971),[1] would be unthinkable.

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Sierra // would certainly be the last to argue that the rate was not intended to be changeable *downward* in accordance with downward changes in PG&E's costs of service. It is equally unrealistic to think that Sierra did not also understand that the rate was intended to be changed *upward* in opposite circumstances.

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[1] The contract provides for an extension of 15 years beyond the date a second 110,000 volt transmission line is placed into service. This second line is expected to be placed into service before the end of 1956, thus permitting an extension of the contract to 1971.

Faced with the reality that two regulated utilities bargaining for a contract would never be so naive[2] as to think that the rates specified in the contract were meant to be frozen for the life of a 15-year contract despite cost changes, Sierra has had to argue that "competition" changed the normal situation and drove PG&E to offer a fixed rate. The "competition", however, is a figment of Sierra's imagination, and the Commission so recognized when it made its finding on the matter:

> "[W]e find Sierra's argument . . . unconvincing in the light of the record which clearly shows that in 1948 Sierra regarded the other sources of supply as being so unacceptable that PG&E became, in fact, the only feasible source."[1]

The fictitious claim of "competition" also evaporates when we examine the 1948 finding of the California Commission—a finding in response to the views held by *both* parties in 1948—that "none of the other // sources of power could be developed before 1951 . . . and . . . development by that time was uncertain."[1]

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The utter falsity of the claim that Sierra understood the contract rate as being fixed permanently for the long life of the contract is vividly shown by the 1948 testimony of its President, Mr. Frank Tracy, who negotiated the contract. Although he testified at length before the California Commission in 1948 as to why the contract was made and why a 15-year term was demanded by both parties, nowhere do we find him making any mention of that which, if true, would have been the most singly important feature of the entire contract—a firm rate for the duration of the service! Quite the contrary, Mr. Tracy entirely negatived the thought of a firm rate when he spoke as follows about the reason for the 15-year term of the contract:

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[1] Opinion No. 270—Mimeo. Pg. 9, 7 P.U.R. 3d 256,262.

[2] Note that Sierra's annual reports show that it enjoys the expert counseling of the Stone & Webster organization on a continuous basis.

> "[W]here you have to go to a relatively large investment [as here] it is only fair . . . that the Company you are negotiating with *gets a proper return on the investment for that period* . . . . [W]e would not expect anybody to go to a large investment which is necessary [here] . . . for a shorter period that that [fifteen years]."[2]

Sufficient has been said, we think, to show that the Commission should review the evidence already on hand and

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[1] C.P.U.C. Decision No. 41537 issued April 27, 1948 in Application No. 29221, Exhibit 13 (p. 4) in F.P.C. Docket No. E-6482.

[2] Exhibit 12, p. 26 in F.P.C. Docket E-6482.

decide // the issue not reached by the Commission before—the nature of the contract rate. For the convenience of the Commission in reviewing this existing evidence, we respectfully refer the Commission to our review of the evidence on this point in our earlier briefs in Docket E-6482.[1]

Although the evidence already before the Commission seems ample to justify the Commission in now making its finding that the contract rate was never intended by the parties to be a firm rate, we would in further proceedings supplement this evidence by additional evidence to be produced by Mr. N. R. Sutherland, the President of PG&E, and the final negotiator of the contract on behalf of his Company. This evidence will show the exact nature of the understanding reached between Mr. N. R. Sutherland and Mr. Frank Tracy when they discussed the intended nature of the contract rate on three separate occasions, one of these occasions being just before the contract was signed.[2]

2. The F.P.C. order approving the 1948 contract rate.

As we have seen,[3] while the Federal Power Commission allowed the 1948 contract to take effect, it expressly declined

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[1] See pp. 16-40 Opening Brief of PG&E, and pp. 5-25 Reply Brief of PG&E.

[2] For a verified statement by Mr. N. R. Sutherland of what his testimony will show, see PG&E's supplemental motion of October 10, 1956, filed in Docket E-6482, and see the "Facts" portion of this submission, pp. 2835, 2837, 2838, 2839.

[3] P. 2836 *supra.*

to give any approval to the rate, the contract, or any obligations purporting to flow therefrom. The order was most explicit:

> "(C) Nothing contained in this order shall be construed as constituting approval by this Commission of any . . . rate . . . or any . . . contract . . . affecting such service or rate . . ., nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting such service or rate.
>
> "(D) This order is without prejudice of any findings or orders which . . . may hereafter be made by this Commission in any proceeding . . . hereafter instituted . . . by or against the applicant."[1]

We have also seen[2] that the California Commission was without jurisdiction to approve the contract. It is thus quite plain that Sierra can draw no force for its claim of a contractual right from any Commission approval.

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[1] The Commission's order is reproduced in full in Appendix A.

[2] P. 2840, *supra.*

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III.

The Facts Warrant the Commission Making the Findings Needed to Support Its Determination That Supplement No. Rates Were and Are Lawful.

We have shown[1] that both Sierra and P. G. & E. agreed in 1948 that the rate (F.P.C. Schedule No. 3) would be changeable in accordance with the regular rates charged by P. G. & E. for resale service.[2] Nevertheless, even if we consider the contract with Sierra to be for a fixed rate for its effective duration, the Supreme Court has stated that such a fixed rate may be changed by the Commission if it is "so low as to adversely affect the public interest as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[3]

The rates in Schedule F. P. C. No. 3 do not compensate P. G. & E. for its out-of-pocket costs. Nor has the contract resulted in any offsetting benefits to P. G. & E. To charge the rates in Schedule F. P. C. No. 3 would mean an undue

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discrimination in favor of Sierra and its customers // located principally in Nevada and against P. G. & E.'s customers, which are in California. Furthermore, the saddling of P. G. & E. with the rates in Schedule F.P.C. No. 3 inevitably results in an increased burden being carried by P. G.

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[1] Point II, pp. 2855, 2859, *supra,* and references in footnte 1, p. 2858, *supra.*

[2] P. G. & E.'s then designated Schedule P-31 (now Schedule R).

[3] Federal Power Commission v. Sierra Pacific Power Co., 350 US ......, 100 L.Ed. (Advance) 300, 304 (1956).

& E.'s other customers. Consequently, the rates in Schedule F.P.C. No. 3 are clearly against the public interest.

1. Supplement No. 1 rate gives effect to the changeable character of the 1948 contract rate.

Since the sale of power by Pacific to Sierra is a sale at wholesale in interstate commerce under the decisions of the Supreme Court, it is governed by the provisions of Section 205(a) of the Federal Power Act which state that "All rates and charges . . . demanded, or received . . . for the sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

The purpose of this scheme of regulation is the protection of the public interest.[1] As the Act shows[2] and as the Supreme Court has said[3] the public interest to be considered normally includes both the interests of consumers

and the interests of investors. However, where the utility has made a contract for a fixed rate regardless of cost of service, mere unprofitableness can be ignored,[1] on the assumption that by agreement the investor interest has voluntarily waived its constitutional and statutory right to a fair return. In such a case, then, only the consumer interest need be considered and, assuming but not conceding that the 1948 contract contemplates a fixed rate, the problem reduces to the question of whether the 1948 contract rate adversely affects that interest.

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[1] *Federal Power Commission v. Sierra Pacific Power Co.,* 350 US 348 (1956).

[2] See for example Sec. 203 relating to mergers, Sec. 204 relating to security issues, and Sec. 305 relating to officers dealing with securities and to interlocking directorates, all of which clearly are designed for protection to investors as well as to consumers.

[3] *Federal Power Comm. v. Hope Natural Gas Co.*, 320 US 591, 602-603 (1944), where it is made clear that investor interest must be considered.

We have shown that P. G. & E. and Sierra did not, by the 1948 contract, agree to a fixed rate. Instead, they agreed in effect that if and when P. G. & E.'s standard rate for resale service should change—and such a change would undoubtedly have to be based on P. G. & E.'s cost of service, fully justified before the California Public Utilities Commission—then the rate for service to Sierra would be correspondingly changed. It is evident, therefore, that any waiver by P.G. & E. of its constitutional and statutory right to a fair return was an extremely limited one. It did not agree, and Sierra did not expect, that P. G. & E. could not increase its Sierra rate if it could justify a general increase in its

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resale tariff. The rationale of the // Supreme Court's decision thus clearly does not apply to the contract which was actually made and fully understood by the parties.[1]

It is clear that neither the *Mobile* nor the *Sierra* decisions stand in the way of an agreement permitting changes in rates on a basis other than that laid down by the Supreme Court.[2] This, in fact, is the situation presented here, and there is no reason why the Commission should not give full effect to the contractual provision for change in the rate, in accordance with the understanding of the parties, just as it has done in recent opinions.[3]

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1. *Federal Power Commission v. Sierra Pacific Power Co.,* 350 US 348 (1956).

2. Schedule F.P.C. No. 3 rate does not compensate P.G.&E. for its avoidable or "out-of-pocket costs".

   a. Sierra has recognized and agreed it must pay at least the avoidable or out-of-pocket costs for service.

Although Sierra disputes the understanding that the 1948 contract rate would change with P. G. & E.'s resale rate, Sierra's President has expressly admitted that he always understood that the contract was subject to change[4] and his counsel has expressly conceded this to be a fact.[5]

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[1] We have already pointed out that there has heretofore been no attempt by the Commission or by the reviewing courts to make a definitive interpretation of the contract.

[2] See the Commission's Op. No. 295, *In the Matter of United Pipe Line Company,* F.P.C. Docket No. G-9547. See also the Commission's order approving a settlement *In the Matter of El Paso Nat. Gas Co.,* F.P.C. Docket G-2018, issued July 20, 1956.

[3] *Ibid.* Cf. *United Gas Pipe Line Co. v. FPC,* 220 F.2d 706, 715-716, cert. denied 350 US 844 (1955).

[4] Testimony of Frank Tracy, President of Sierra, Tr. p. 926.

[5] Sierra's Opening Brief before the Commision, p. 50.

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These // concessions were compelled by the fact that the contract itself expressly provides for change. The only dispute is over the basis for changes. However, both Sierra's President and its counsel have stated that they understood that the legal effect of the contract was that P. G. & E. would be entitled to have the Commission increase the rate if P. G. & E. did not earn "more under the contract rate than it would save if Sierra's business were lost or abandoned"[1] or if it did not return incremental or out-of-pocket costs.[2] On the evidence, therefore, even assuming that Sierra's most recently expressed understanding of the effect of the contract is correct, P. G. & E. is fully entitled to have the rate changed if it does not cover the avoidable costs of rendering service, for Sierra fully concedes that this much of P. G. & E.'s constitutional and statutory right to a fair return was not waived.

The effect upon the public interest of operations at a loss has been fully recognized by Sierra itself, as shown in its brief to the Commission upon submission of the original case. Sierra there stated in its second point as follows (p. 63):

> "It is in the public interest that the present contract be maintained in full force and effect, at least as long as Pacific earns more under the contract rate than it would save if Sierra's business were lost or abandoned."

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1. Sierra's Opening Brief before the Commission, p. 63.
2. Testimony of Frank Tracy, Tr. pp. 982 and 987.

On page 64 of the same brief, Sierra states:

> "The only harm such a contract could do from the standpoint of the public interest would arise either if the burden of low rates were borne by other consumers of the utility, or if the rates were so low that it would be more profitable to the utility to abandon the business and lose its investment than to continue rendering the service at those rates."

These are exactly the tests which we shall apply in determining the costs which could be avoided by eliminating the Sierra service. These are the "avoidable costs"—those which would be saved if P. G. & E. were not to fulfill its service obligations to Sierra. They are the expenditures which cannot be avoided if P. G. & E. is to live up to its contract obligations to supply power.

b. It is against the public interest for Sierra not to pay at least the avoidable or out-of-pocket costs for service.

A rate which fails to cover out-of-pocket or avoidable costs by a substantial margin is contrary to the public interest and hence unlawful. Such a rate in the words of the Supreme Court, (1) "impair[s] the financial ability of the public utility to continue its service," (2) "cast[s] upon other customers an excessive burden", and (3) is "unduly discriminatory."

That an avoidable loss is contrary to the public interest is obvious. The utility is actually putting out more dollars than it is taking in. This is not a mere matter of vanishing

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profits; it is a matter of wasting of assets devoted // to public service. It starts a slow and insidious attrition whereby future avoidable costs constantly exceed future revenues. This means that service to Sierra continues at the contract rate only because subsidized from other business. This is contrary to an elemental concept necessary to the proper protection of public utility customers from abusive discrimination. The other customers of P. G. & E. are entitled to have all of the revenues which they provide used for their service and not taken to subsidize Sierra's service.

The importance to the public interest of having rates cover costs has been recognized in a very recent case before this Commission where Commissioner Connole, concurring said:

> "This Commission cannot . . . condone the almost unavoidable discriminations inherent in sales made below cost. Whether or not the perpetuation of interruptible sales at rates below cost is inevitably destruc-

> tive of the financial stability of the company, as it appears clearly to me to be, remains to be seen. I have approved this settlement, not because I do not believe such to be the case or because the risk has been minimized. I approve it only because the total dollars do not appear to yield more than a reasonable return and because at this tardy date, with the policy long set, no other course of action remains open to us." (*Northern Natural Gas Co.,* Docket No. G-2505, et al., Order approving proposed settlement etc., issued July 26, 1956.)

That the Commissioner's statement is true of avoidable costs cannot be doubted. Note also the implication in *Jaspan v. Philadelphia Electric Co.,* 1 F.P.C. 561, at 565 (1938)

that the Commission would have mad a serious investigation if it appeared that the utility was selling power at less than cost.

The California Commission clearly regards sales below out-of-pocket cost as contrary to the public interest. The Commission has ordered a ferry boat company to abandon service on one of its routes (even though the company had not requested such action) because the revenue therefrom did not pay out-of-pocket costs. "Failing in this", the Commission said, "the continued maintenance of the service constitutes an undue burden upon the balance of the ferry company's system and thereby creates that discrimination forbidden by law".[1]

c. The F.P.C. Schedule No. 3 rate does not compensate P. G. & E. for its avoidable or out-of-pocket costs.

We show in Schedule 1[2] that the out-of-pocket or avoidable costs which P. G. & E. has and will necessarily incur solely by reason of continuing to render service to Sierra will exceed the revenue under the 1948 contract rate by almost $11,000,000 for the period from 1952 (the first test year in this case) through 1971 (the now apparent termination year of the contract). This avoidable loss, averaging about $550,000 per year, represents money which must be

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provided from revenues // received from other customers in order to continue service to Sierra.

The effect on the public interest of an annual out-of-pocket loss of $550,000 is not eliminated simply because percentage-wise the amount is small in relation to over-all earnings of the Company from all of its activities including service to more than 1,700,000 electric customers and more than 1,400,000 gas customers. This Commission can consider only the case which is actually before it, and must be guided by the public interest as it appears in that case. If the public interest in having the utility secure adequate revenues to cover the out-of-pocket costs necessarily incurred in rendering and maintaining service can be ignored in this case, then it must be ignored in every case which involves only a small part of the utility's business, and the utility would have to be on the verge of bankruptcy and in an irretrievable position before the Commission could act. It must be clear that the Commission has jurisdiction not only over the "last straw" but over each straw which may contribute materially to such a result. Any other conclusion would leave the Commission impotent to perform its primary function of protecting the public interest.

This has been recognized most recently by the Supreme

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1. 41 *Calif. RR Comm. Reports* 437, 451 (1938).
2. Appendix C.

Court of Maine. In answer to a contention that the public interest did not require increase of a contract rate for

electric // service because the amount of the increase was tiny as compared to the utilities total revenues, the Court said:[1]

> "The amount involved, $18,000, is unquestionably small in comparison with petitioner's total gross revenue of $29,500,000 reported in October 1954. It is less than 1% of the total increase of $2,520,000 authorized in the general rate case. We may well agree that the petitioner's ability to perform its obligations to the public will not be hampered materially if the contract rate is maintained without increase. The respondent's argument, unsound in our view, leads to the conclusion that a given rate within a utility system should not be increased provided sufficient income is obtainable elsewhere.
>
> The governing principle in adjustment of rates is more equitable. If rates must increase, all should bear the burden. Surely the customer whose rate is last to be considered should not escape a general increase for the reason that he is last in line or that sufficient income has been raised elsewhere."

d. The failure of Sierra to pay a rate sufficient to meet the avoidable or out-of-pocket costs for its service is a burden to P. G. & E.'s other customers.

That an out-of-pocket loss of $550,000 a year must inescapably be a burden upon other customers should be apparent. The dollars to cover these losses must be obtained from the only source which the utility has of obtaining dollars, and this is from its customers. Any attempt to take those

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[1] In re *Central Maine Power Co.*, 122 A2d 541 (Maine, 1956).

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dollars away // from the return which the utility must earn in order to attract the new capital necessary to fulfill its obligations to serve the expanding population and economy of California cannot help but result in a lower return which will result in added costs of obtaining new money and hence must ultimately be reflected in the costs to be borne by all consumers.

We have not determined the exact effect of the loss which we have shown upon P. G. & E.'s cost of money since this must be a matter of judgment. Undoubtedly, it would be only a fraction of a percent. However, it must be recognized that even a very small fraction of a per cent applied to the vast amounts of capital which P. G. & E. must raise in the next 15 years to meet its public utility obligations[1] would be a substantial sum of money, particularly when it is realized that such increased costs of money would be reflected over the life of long-term bonds and the indefinite period during which preferred and common stocks will be outstanding.

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[1] Estimates for the future by General Electric Company anticipate a doubling of the nation's power requirements in only 10 years. P. G. & E.'s service area in Northern and Central California can be expected to be among the leaders in this growth. P. G. & E. has had to raise more than one billion dollars from the sale of securities in the eleven post-war years and its requirements during the 15 remaining years of the Sierra contract are bound to be greater.

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The immediate mechanism by which the investing public would reach its conclusions as to yields required on new P. G. & E. securities is obvious. A significant element in the evaluation of bond yield requirements is the ratio between bond interest requirements and revenues available to pay such interest after operating expenses are met.

Similar considerations are important in the evaluation of preferred stocks. When it comes to common stocks, earnings are, of course, most important. The conclusion cannot be avoided that a substantial reduction in earnings available for bond interest, preferred stock dividends, and common stock dividends will have an effect on investors' appraisals. We cannot ignore an item of the magnitude which we have shown here simply because this item is one of many which goes into the net figure on which investors base their decisions.

The Commission, therefore, has a clear duty to the public to see that a utility recovers its entire avoidable costs.

The adverse effect on the public interest of requiring P. G. & E. to serve Sierra at a loss is well demonstrated by the situation created by Sierra's requirements for additional power beyond the capacity of the three transmission lines over which P. G. & E. has delivered power to Sierra since 1949. P. G. & E. is just about to complete an enlargement of the capacity of one of these lines by 25,000 kilowatts at a cost of well over one million dollars. It is per-

fectly obvious that // P. G. & E. could not have raised any portion of this capital requirement on the strength of its Sierra operation at 1948 rates. The money was raised only on the credit of the remainder of P. G. & E.'s operations and would have to be paid for from other operations if P. G. & E. is required to operate the Sierra service at a loss.

Financial impairment is also obvious if, instead of using the incremental, avoidable cost approach, we consider separately either the sales to Sierra alone or all of P. G. & E.'s jurisdictional interstate power sales. In this method average costs instead of avoidable costs, are allocated to the service, and we find[1] that in 1955 P. G. & E. would have earned only 0.15% return from the Sierra service alone, with revenues at the 1948 rate[2], and would have earned only 3.05% return from all its jurisdictional interstate service, not enough to cover even the cost of bond money. Thus, from any point of view, financing the Sierra business must rely

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[1] See Appendix C, Schedule 4.

[2] The reason that the average allocated cost approach shows a slight return while the avoidable cost approach shows a large loss is that avoidable cost includes the cost of money which P. G. & E. would not have to raise if the Sierra service were eliminated. This cost of money is clearly a dollar outlay which could be saved, and hence is an avoidable cost.

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entirely on the credit // arising from P. G. & E.'s other revenues if the contract rate is restored, clearly a situation which is not in the best public interest.

In this proceeding, the Commission must look at the cost of service to Sierra, and not to the rate of return for P. G. & E.'s entire Electric Department, for it must consider only the business to which the rate complained of applies in determining if it is against the public interest.[1] Even if the Commission in this case were to look to the return from other jurisdictional electric service,[2] it would find, as we have shown, the loss sustained from Sierra's business is not being offset by revenues from the California-Oregon Power Company service (P. G. & E.'s only other jurisdictional business) so as to give P. G. & E. a proper rate of return.[3]

3. No offsetting benefits accrued to P. G. & E. from the 1948 contract.

The Commission's Order herein, dated September 7, 1956, states that proper effect shall be given "to any benefits accruing to P. G. & E. through the retention of its Sierra business". We, therefore, make a showing on this point.

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1. *Northern Pacific Ry. v. North Dakota,* 236 US 585 (1915).

2. *Panhandle Eastern Pipeline Co. v. Federal Power Commission,* 324 US 635 (1945).

3. See Appendix C, Schedule 4.

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a. No financial benefit accrued to P. G. & E.

To determine what financial benefit, if any, accrued to P. G. & E., the only course is to compare the actual situation under the 1948 contract (Schedule F.P.C. No. 3) with the situation which would have existed if no such contract had been made. This introduces a speculative element which can be appraised only in general terms.

In 1948 P. G. & E. was serving Sierra under a 1938 contract which had almost six years to run, i.e., until November 1, 1953. In 1948 Sierra's electric requirements to meet its 1949 peak were expected to (and did) exceed the capacity of the two then existing 60,000-volt lines connecting P. G. & E. and Sierra. Sierra had no feasible means of securing power to meet that 1949 peak from any source other than P. G. & E. Neither the Bureau of Reclamation nor the construction of generating plants by Sierra could be counted upon for an additional supply of power in a period less than three years. Consequently, we may reasonably *assume* that until January 1, 1952, at the earliest, Sierra would have purchased power from P. G. & E. up to the full capacity of the two 60,000-volt lines.[1]

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[1] It is obvious that any assumption that Sierra continued under the old 1938 contract is unrealistic and leaves unsolved the problem of how Sierra would have met its public utility obligations for service. However, leaving these aspects aside, we may consider the situation solely with respect to P. G. & E. service to Sierra.

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For the period from January 1, 1948 to December 31, 1951, under the above assumption, P. G. & E. would have continued to supply power to Sierra under the 1938 contract up to the capacity of its then existing transmission lines. Under the 1938 contract rates, the revenues to P. G. & E. during this period for the power delivered to Sierra would have been approximately 10% higher than under Schedule F. P. C. No. 3. Since the 110,000-volt transmission line provided for in the 1948 contract would not have been constructed by P. G. & E., its deliveries of power would have been somewhat less and its costs would have been reduced correspondingly. It is clear, therefore, that there is no benefit to P. G. & E. to be taken into account for this period of time.

For the period subsequent to January 1, 1952, our speculation must consider two alternatives. The first is that Sierra as of that date, completed and placed into operation generating capacity sufficient to supply its entire load. In that event, Sierra would presumably have eliminated purchases from P. G. & E., but would have been required to pay the minimum charge under the 1938 contract until November 1, 1953. It is evident that with Sierra's construction of its own generating capacity, P. G. & E. would be able to make a corresponding reduction in its own capacity requirements (except for such standby capacity as was paid for

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by Sierra). P. G. & E. would // then have less costs. This reduction in cost would be greater than the amount of revenue lost by dropping Sierra. This can be seen by examining Schedule 1 which sets forth the costs which would be eliminated by dropping Sierra's load and the revenue received from Sierra. The difference between those two figures will be seen to exceed the minimum charge of $75,000 per year that Sierra would be obligated to pay until November 1, 1953.

The second alternative situation to be considered as of January 1, 1952, is the possibility that Sierra might then have been purchasing power from the Colorado River Commission of Nevada which would, in turn, have been purchasing Shasta Dam power from a Bureau of Reclamation transmission line.

This would have meant that P. G. & E. would have lost the Sierra load and at the same time would have lost an equivalent amount of power supply from the Bureau's Shasta Dam, and hence P. G. & E. would not have been able to eliminate any new capacity additions as a result of loss of the Sierra load. P. G. & E.'s reduction in cost would, therefore, be represented by the reduction in cost of purchases from the Bureau. The cost to P. G. & E. of Bureau power was substantially less than P. G. & E.'s average cost of power, hence the average cost of power on P. G. & E.'s system would have been increased. This increase would have

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had to be borne by the customers on the // remainder of P. G. & E.'s system, since the resulting average cost of power would certainly have been allowable in P. G. & E.'s 1952 rate increase proceeding.

It will be observed that under this alternative, as well as under the prior alternative, Sierra would have been obligated to continue to pay the minimum charge of the 1938 contract until November 1, 1953. Furthermore, as long as the interconnection was maintained there would have had to be an increase in the amount of the standby charge. Since the President of Sierra has expressly stated that if Bureau power were purchased, it would have been necessary to obtain standby power (and we agree that this was an operating necessity) we may assume that Sierra would have negotiated for standby power from P. G. & E. to the full extent of the 60,000-volt transmission capacity from January 1, 1952 onward, and we may at least assume that P. G. & E. would have been fully compensated for its standby service. The extent to which P. G. & E. would have received income from Sierra for standby service cannot be determined. But it would have received some income from this source if Sierra had elected to purchase Bureau power.

From the foregoing, it is an inescapable conclusion that P. G. & E. obtained no material financial benefit from entering into the 1948 contract with Sierra. We may further observe that P. G. & E. would not have been penalized by

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the // California Commission in its 1952 rate case for the difference between the 1948 contract rate and the Schedule R rate, if the 1948 contract had not been in existence.

Lastly on this subject, we may observe that any increase in costs of power borne by P. G. & E. customers as a result of diversion of Shasta Power to Nevada would have been a purely temporary matter. At the end of 1952, the Bureau committed 290,000 kilowatts, substantially all of the Shasta firm power which was not required for other preference customers, to the Sacramento Municipal Utility District (Sacramento). Had 90,000 kilowatts been committeed to the Colorado River Commission of Nevada in 1948, presumably only 200,000 kilowatts could have been committed to Sacramento. Since Sacramento's load is now approaching the 200,000 kilowatt mark and should reach 290,000 kilowatts by

1959, it is evident that by 1959 it will make no difference in P. G. & E.'s costs whether 290,000 kilowatts are purchased by Sacramento alone or by Sacramento and Nevada in combination. In either case, P. G. & E.'s purchase of Shasta power will be at the vanishing point.

With respect to the 1956-1959 period, it must be kept in mind that if Sacramento were getting only 200,000 kilowatts it would have to purchase supplementary power from P. G. & E., as it has already contracted to do when its load exceeds 290,000 kilowatts. Since this supplementary power is to be

supplied at a rate based on Schedule R, it follows that if Nevada were taking some of the Shasta power now sold by the Bureau to Sacramento, P. G. & E. would be selling power to Sacramento on the Schedule R basis. Thus, again, it can be shown that no financial benefit accrued to P. G. & E. by reason of the 1948 contract.

b. No competitive advantage accrued to P.G.&E.

In view of Sierra's repeated claims that P. G. & E. gained some competitive advantage by contracting with Sierra in 1948, it seems advisable to point out once again some of the plain facts which refute Sierra's perennial contention.

As to the situation of Sierra itself, the Commission has expressly found that P. G. & E. was regarded as the only feasible source for the additional power which was so urgently needed by Sierra to meet its rapidly expanding load. Although Sierra has attacked this conclusion of the Commission, it has never succeeded in suggesting any plausible alternative source of power which could have met Sierra's requirements. In fact, Sierra went to the absurd lengths of claiming before the Commission that it might have constructed hydroelectric plants on the Walker River to "tide it over" the succeeding three or four years,[1] completely ignoring the common sense fact, to which Sierra's President testified, that a hydroelectric plant takes at least three years to construct.[2]

So far as competition with the Bureau of Reclamation for service to other customers is concerned, P. G. & E. gained

no advantage whatever by contract with Sierra. Any notion that P. G. & E. "tied-up" the Bureau power, another suggestion repeatedly made by Sierra, is completely contrary to fact. P. G. & E.'s contract for Bureau power have always permitted the Bureau to sell the power elsewhere. Consequently, the failure of the Bureau to make a contract with the Colorado River Commission of Nevada for delivery of power to Nevada did not in the least impair the Bureau's ability to compete with P. G. & E. and actually left the Bureau with a greater amount of power to offer to P. G. & E.'s other customers. For example, if the Bureau had committed 90,000 kilowatts of capacity to the Colorado River Commission of Nevada, it would have had that much less power to commit to the Sacramento Municipal Utility District in 1952. If the Bureau were able to sell only 200,000 kilowatts to Sacramento instead of 290,000 kilowatts, P. G. & E. would probably now be called upon by Sacramento for supplementary power instead of waiting until 1959 as now contemplated by P. G. & E.'s supplementary power contract with Sacramento. In the light of these facts it is impossible to find that P. G. & E. gained any competitive advantage in contracting with Sierra in 1948.

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[1] Sierra's Opening Brief before the Commission, p. 66. See also p. 39.

[2] Tracy testimony, Tr. p. 217.

4. Undue discrimination results from F. P. C. Schedule No. 3.

The rate in F.P.C. Schedule No. 3 which Sierra urges now to be lawful is about 22% below the Schedule R rate

[2881]

which was established by the California Commission as P. G. & E.'s standard resale tarff in 1952.[1] Schedule R is also the basis of P. G. & E.'s two resale contracts with the California Oregon Power Company (Copco) the only power sales by P. G. & E., other than to Sierra, subject to the jurisdiction of the Federal Power Commission. In Opinion No. 270 herein, this Commission has found the Copco and Sierra services to be generally comparable, noting, however, that the cost of service to Sierra was approximately one-seventh greater. This higher cost results from the fact that service to Sierra requires construction, operation and maintenance through a rugged mountainous area with heavy winter snowfall, the route being largely outside P. G. & E.'s integrated electric network area.

Since the Commission has, in effect, already held that Schedule R is an appropriate basis for comparison to determine whether discrimination exists, it should follow as a matter of course that a rate 22% lower is discriminatory, especially when it is applied to a service much higher in cost[2] than the average resale service.

[2882]

Since the Commission made its original determination, events have fully justified the use of the Schedule R rate as a basis for comparison. Nine of the municipalities formerly served under special contracts have now agreed to pay substantially the Schedule R rate after a three-year transition period.[1] A tenth municipality formerly under special contract is now paying the Schedule R rate. An eleventh municipality, Sacramento Municipal Utility District, formerly served under // special contract is now a customer of the Bureau of Reclamation but has contracted to purchase, at a rate based on Schedule R, supplementary power from P. G. & E. New resale services to the California Oregon Power Company and to Southern California Edison Company, inaugurated since Opinion No. 270 was issued, are being rendered at rates based upon Schedule R. All of

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[1] Exhibit 17, p. 40.

[2] See Exhibit 36 (Revised) which shows that the rate of return from Sierra has been consistently lower than that from other resale customers even when they were on equivalent rates.

[2883]

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[1] Sierra would have the Commission believe that P.G.&.E. is being inconsistent in proposing the Schedule R rate for Sierra because the seven-year contracts with the municipalities provide somewhat lower rates than Schedule R for the first three years of the contract term and P. G. & E. has stated that performance of these contracts "will not constitute a burden upon Pacific's other consumers". There are three facts conveniently ignored by Sierra which provide a complete answer to this contention. In the first place, as already noted, the cost of service to these customers is less than costs to serve Sierra. In the second place, the contracts in question expressly permit and provide for changes in the rate so that if any general increase in P. G. & E.'s resale rate is authorized, the contract rates will be changed accordingly. Thus, these customers will bear their due portion of any increase found to be reasonable by the California Public Utilities Commission.

In the third place, it will be noted that although the rates to these municipal customers are stepped up to the Schedule R rate over a period of three years, the average rate for the term of the contract will be more than one-fifth higher than the contract rate which Sierra claims to be reasonable and non-discriminatory. Sierra's argument attempts to segregate the rates during the step-up period from the rate over the life of the contract. This is clearly improper. P. G. & E.'s statement that the municipal contracts are not expected to burden other customers relates to the performance of the contracts as a whole and takes into account the costs and the rate changing provisions incorporated therein.

these contracts based on Schedule R are subject to change in the future. None are fixed-rate contracts.

As we have shown, restoration of the 1948 rate would simply require that service to Sierra be subsidized to the extent of some $550,000 per year and this subsidy must inevitably burden P. G. & E.'s other customers.

Any subsidy to Sierra is entirely unwarranted. During 1954 and 1955, it paid to P. G. & E. the Schedule R rate and yet earned 6.09% and 6.25% return, respectively. If it had paid only the 1948 rate, it would have earned 7.43% and 7.69% for those years, respectively.[1]

Contrast with these figures, P. G. & E.'s actual rate of return for its electric system. Including revenues from Sierra at the Schedule R rate, the return was only 5.47% in 1955 and is estimated for 1956, on an average basis, at only 5.20%.[2] All of these earnings should be used to maintain P. G. & E's credit standing, not to subsidize Sierra.

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1. Appendix C, Schedule 3.
2. Appendix C, Schedule 2.

[2884]

IV

Sierra Has No Basis for Filing Its Complaint

The prayer of Sierra's complaint (Docket E- 6697) asks that the Commission "take such action as it may deem appropriate for the purpose of enforcing compliance with the [Federal Power] Act and the Commission's rules and regulations." P. G. & E. takes no issue with this request with which it is like-minded with Sierra, but it does take issue with the allegation which is made in the complaint purportedly in support of this request and which is obviously intended to color it.

Sierra has alleged that since February 27, 1956 P. G. & E. has been unlawfully demanding a rate or charge for electric energy different from that prescribed in P. G. & E.'s rate schedule now lawfully on file with the Commission.

P. G. & E. answers that it may charge Sierra at the Supplement No. 1 rates because—

a. Supplement No. 1 rates are actually on file with the Commission and, by Commission regulation Section 35.2, rates actually on file must be charged,

b. The Supreme Court opinion of February 27, 1956 on which Sierra relies holds that the Commission order of June 17, 1954 finding the Supplement No. 1 rate lawful can be valid if based on the necessary findings,

[2885]

c. The Commission has had remanded to it for further findings the case (F.P.C. Docket No. E-6482) in which its order of June 17, 1954 was issued and the Commission has not yet made its findings, and

d. Sierra has not paid for electricity at the Supplement No. 1 rates since January 1956 and hence has not been damaged by P. G. & E. charging such rates.

1. Supplement No. 1 rates are actually on file with the Commission and, by Commission regulation Section 35.2, rates actually on file must be charged.

Section 35.2 of the Commission's Regulations reads as follows:

> "No public utility shall directly or indirectly demand, collect, or receive, for the transmission or sale of electric energy subject to the jurisdiction of the Commission, or for the lease or utilization of any facilities subject to the jurisdiction of the Commission, any rate or charge different from that prescribed in its rate schedule or schedules actually on file with the Commission, unless the Commission shall, for good cause shown, otherwise provide by order."

The rates in Supplement No. 1 are actually on file with the Commission and have been since on or about February 2, 1953. Furthermore, the Commission has by its orders of March 13, 1953 and June 17, 1954 recognized that those rates were actually on file with the Commission. These, then, are the rates to be charged. As the United States Supreme Court has said[1]:

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> "[Petitioner"] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."

In addition to citing Section 35.2, Sierra in its complaint cites Section 205(d) of the Federal Power Act in support of its allegation that it is unlawful for P. G. & E. to charge the rates in Supplement No. 1.

Section 205(d) of the Act states that "Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate [that is, a rate for transmission or sale of electric energy subject to the jurisdiction of the Commission] . . . or in any rule . . . or contract relating thereto, except after thirty days' notice to the Commission and to the public . . ."

The rates prescribed in Supplement No. 1 to Rate Schedule F.P.C. No. 3 were filed with the Commission on or about February 2, 1953. The Commission on March 13, 1953 provided that the rates in Supplement No. 1 would be effective as of September 6, 1953 on a temporary basis pending final determination by the Commission of the lawful rate. The rates in Supplement No. 1 did not go into effect until September 6, 1953. Both the Commission and the public were given much more than the 30 days' notice required by the Act. Sierra itself knew of the proposed rates in Supple-

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[1] *Montana-Dakota Util. Co. v. Northwestern P.S. Co.*, 341 U.S. 246, 251 (1951).

[2887]

ment No. 1 at or // before the date of the filing with the Commission. It is thus apparent that there has been no violation of the requirements of Section 205(d) of the Act.

2. The Supreme Court opinion of February 27, 1956 on which Sierra relies holds that the Commission order of June 17, 1954 finding the Supplement No. 1 rate lawful can be valid if based on the necessary findings.

The Supreme Court did not declare the rates in Supplement No. 1 unlawful. It determined that the contract between P. G. & E. and Sierra was not changed simply by the filing of Supplement No. 1, but that the contract rate could be changed by the Commission's order of June 17, 1954, if based on the necessary findings. Nor did the Supreme Court independently consider the P.G.&.E - Sierra contract, instead the Court assumed the contract to be for a fixed rate, as the Commission had stated in effect that since even a fixed rate contract could be modified by the Commission, it was unnecessary to examine into any agreement of the parties concerning rate modifications.[1]

The sequence of orders dealing with the rate set out in Supplement No. 1 was as follows:

a. The Commission on March 13, 1953 provided that the rates in Supplement No. 1 would be effective as of September 6, 1953 on a temporary basis pending final deter-

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[1] See pp. 2842-2843, 2853, *supra.*

[2888]

mination by the Commission of the lawful rate.

b. The Commission by its order of June 17, 1954 held the rates in Supplement No. 1 to be lawful rates.

c. The Court of Appeals for the District of Columbia Circuit by its decree of February 24, 1955 set aside the Commission order of June 17, 1954 and remanded the case to the Commission.

d. The Supreme Court by its judgment of February 27, 1956 affirmed the decree of the Court of Appeals, but instructed that the case be remanded to the Commission "for such further proceedings, not inconsistent with the opinion of this Court, as the Commission may deem desirable."

e. Sierra sought to have the Supreme Court (1) amend its instructions upon remand to limit further proceedings before the Commission to the determination of the lawfulness of the contract rate "at the time of such further proceedings" and the fixing of the rate "thereafter to be observed and in force," and (2) declare that any amounts paid by Sierra in excess of the contract rates were unlawfully collected and that defendant was obligated to make restitution of the excess payments. On May 28, 1956, the Supreme Court denied said motion without prejudice to the future determination of such rights as Sierra might have to restitution.

f. Both the United States Court of Appeals for the

District of Columbia Circuit and the United States Supreme Court have reviewed the Commission's said Opinion No. 270 and the proceedings had in connection therewith. As a result of the reviews, the said Court of Appeals ordered on June 12, 1956 "that this case be, and it is hereby remanded to the Federal Power Commission for such further proceedings not inconsistent with the opinion of the Supreme

Court in No. 51, October Term, 1955, *Federal Power Commission v. Sierra Pacific Power Company,* and No. 53, October Term, 1955, *Pacific Gas and Electric Company v. Sierra Pacific Power Company,* as the Commission may deem desirable."

g. On or about June 12, 1956 P. G. & E. filed a motion with the Commission asking that the said proceedings be reopened. The Commission has not yet issued its order in response to this motion.

The Supreme Court's opinion specifically indicates that the determination of the lawful rate is the prerogative of the Commission and that in exercising such jurisdiction it may prescribe a change in contract rates whenever it determines such rates to be unlawful. The Supreme Court's opinion expressly states that the Commission order of June 17, 1954 could have been effective to prescribe the proposed rate (Supplement No. 1) as the rate to be in effect prospectively from the date of the order, June 17, 1954,

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if based on the // necessary findings. The Court went on to state that "if the proceedings here satisfied in substance the requirements of Section 206(a), it would seem immaterial that the investigation was begun as one into the reasonableness of the proposed rate rather than the existing contract rate."

The Court's opinion goes on to point out that the Commission had applied an erroneous standard in judging the proper rate to be authorized. The Commission should have decided whether the rates in Rate Schedule F.P.C. No. 3 were so low as to adversely affect the public interest.

The Commission, by order adopted September 25, 1953 and issued September 28, 1953, declared that the proposed rates of said Supplement No. 1 had become effect as of September 6, 1953, subject to certain provisions of Section 205(e) of the Federal Power Act and made certain orders with respect to accounting and to refund in the event that any portion of the increased rates should be found not to be justified. Subsequently, the Commission, by Opinion No. 270 adopted June 16, 1954 and issued June 17, 1954, found that the proposed rate of said Supplement No. 1 was just, reasonable and lawful and, that "if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore

[2891]

unlawful;" and in effect by // order authorized P. G. & E. to charge and collect from Sierra the proposed increase under Supplement No. 1 to Schedule F.P.C. No. 3. The Commission has not amended or rescinded its said Opinion No. 270 and the order contained therein, and the Commission has not made any further order with respect to said Supplement No. 1. Consequently, the bills rendered to Sierra by P. G. & E. lawfully demand payment at the schedule of rates set forth in said Supplement No. 1.

3. The Commission has had remanded to it for further findings the case (Docket No. E-6482) in which its order of June 17, 1954 was issued and the Commission has not yet made is findings.

Although the June 17, 1954 order of the Commission was set aside by order of the Court of Appeals, Supplement No. 1 was permitted by the Court to remain on file with the Commission pending final disposition of the matter pursuant to the remand. Unless and until that filing is rejected,

P. G. & E. must charge the rate therein specified. This is not the situation presented in *United Gas Pipe Line Company v. Mobile Gas Service Corporation*[1], where the rate filing was originally ineffective and remained so for the entire period in question—a nullity as the court said. We are here concerned with a filing which, although ineffective during the pendency of the Commission proceedings, was

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expressly // stated to be capable of effect if the substantive requirement of Section 206(a) of the Federal Power Act were met.

The Commission has yet to determine whether or not the essential condition to the lawfulness of said Supplement No. 1 exists and has existed ever since the date of the Commission's said Opinion No. 270, i.e., whether or not said Rate Schedule F.P.C. No. 3 is and was contrary to the public interest. If the Commission should find the existence of said essential condition, clearly it cannot reject the filing of said Supplement No. 1 and its lawfulness will be fully established. On the other hand, if the Commission should fail so to find, then it must reject the filing of said Supplement No. 1 and complainant would be entitled, under equitable principles governing restitution, to have refunded to it all payments in excess of the lawful rate as finally determined.

4. Sierra has not paid for electricity at the Supplement No. 1 rates since January 1956 and hence has not been damaged by P. G. and E. charging such rates.

Sierra, in alleging, as it does in its complaint, that P. G. & E.'s demand for payment of electric service at Supplement No. 1 rates will irreparably impair Sierra's sale of its securities reaches far in its attempt to support its complaint. Sierra's counsel is apparently impelled to make this allegation because Sierra has not been paying the rates

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[1] 350 U.S. 332, 100 L.Ed. 291 (Advance); 76 Sup. Ct. 373; 12 PUR (3) 112.

[2893]

demanded by P. G. & E. and hence can show no actual monetary damages directly caused by P. G. & E.'s billing.

If Sierra pays the bills as rendered by P. G. & E., it would even then not be damaged thereby in the event the Supplement No. 1 rates are held by the Commission to be unlawful, because P. G. & E., would be obligated to repay any excess payments with interest. Furthermore, regulated utilities such as Sierra and P. G. & E. frequently find themselves in the position of having their revenues and expenses subject not only to the vicissitudes of general economic conditions, but also to the uncertainties concomitant with the activities of regulatory commissions. These uncertainties are necessarily part and parcel of a utility's operations, though much of the adverse effects of delays in regulatory decision are alleviated by the refund procedure.

[2894]

Summary and Conclusion

The 1948 contract rate was the same as P. G. & E.'s then effective rate for intrastate resale service. It was expressly understood by Sierra that the rate would be subject to change in accordance with changes in that intrastate rate.

Supplement No. 1 to Schedule F.P.C. 3 is the same as P. G. & E.'s most recently authorized intrastate resale rate and should be made applicable to service to Sierra in accordance with the expressed understanding of the parties.

Even were it assumed that the contract provided for a fixed rate, it is conceded by all that the rate is still subject to modification by this Commission in the public interest. The public interest clearly requires such modification.

P. G. & E. will suffer an avoidable or out-of-pocket loss of approximately $11,000,000 if Schedule F.P.C. No. 3 is made applicable to this service. Such a loss would adversely affect P. G. & E.'s ability to render this service unless the loss were made up by revenues from other customers. If the loss were so made up, an undue burden on those other customers would be imposed.

Schedule F.P.C. No. 3 is clearly discriminatory. It is lower than the rate to P. G. & E.'s only other interstate resale customer (which customer receives service comparable to Sierra's) even though the cost to serve Sierra is

[2895]

1/7th greater. // It is also lower than the rate to P. G. & E.'s intrastate resale customers served under similar conditions.

The Commission has been afforded the opportunity to repair its findings previously made in the proceeding. It should not abdicate its duty to the public interest by refusing to grant P. G. & E.'s motions now before it. Such refusal would not only terminate the proceedings without adequate consideration of the vital issues affecting the public interest but would also deny P. G. & E. the hearing to which it is clearly entitled in the light of this submission. It is also clear that in the interest of administrative-judicial cooperation the Commission should determine the issues before it as a basis upon which the District Court can dispose of the suit instituted by Sierra.

P. G. & E.'s motions to reopen of June 8, 1956, and its supplemental motion to reopen of October 10, 1956, should each be granted.

Dated this 13th day of October, 1956.

Respectfully submitted,

F T. SEARLS
JOHN C. MORRISSEY
ROBERT E. MAY
Attorneys for
Pacific Gas and Electric Company

State of California
City and County of San Francisco—ss

N. R. Sutherland, being first duly sworn deposes and says that he is the President and General Manager of Pacific Gas and Electric Company, the party filing the attached Submission, that he has read the Submission and knows the contents thereof, and that the same are true to the best of his knowledge and belief.

N. R. SUTHERLAND

Subscribed and sworn to before me
this 13th day of October, 1956
MARIE H. STANLEY
Notary Public in and for the
City and County of San Francisco
State of California

My Commission Expires: November 22, 1959.

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[2897A]

[Appendix "A"]

[2898]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Thomas C. Buchanan, Leland Olds and Harrington Wimberly.

August 3, 1948

In the Matter of
PACIFIC GAS AND ELECTRIC COMPANY

ORDER ALLOWING RATE SCHEDULE TO TAKE EFFECT

Upon consideration of the application filed by Pacific Gas and Electric Company requesting that its Rate Schedule designated FPC No. 3 superseding FPC No. 2 providing reduction in rates to Sierra Pacific Power Company be allowed to take effect as of January 1, 1948;

The Commission *orders* that:

(A) The aforesaid Rate Schedule FPC No. 3 be and it hereby is allowed to take effect as of January 1, 1948.

(B) The aforesaid rate schedule shall be deemed to have been filed and published in compliance with the Federal Power Act.

(C) Nothing contained in this order shall be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice affecting such service or rate provided for in the above-designated rate schedule, nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate.

(D) This order is without prejudice to any findings or orders which have been or may hereafter be made by this Commission in any proceeding now pending, or hereafter instituted, by or against the applicant.

By the Commission.

Leon M. Fuquay,
Secretary.

Date of Issuance: August 5, 1948

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Appendix "B"

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[2899]

[Appendix "C"]

Schedule 1—Sheet A

This schedule describes and shows the costs which could be avoided by P. G. & E. if service to Sierra was eliminated and compares these avoidable costs with revenues under the Contract rate (F.P.C. Schedule No. 3) and under the Proposed Rate (Supplement No. 1 to Schedule No. 3) and shows the avoidable loss which would be experienced under the contract rate to be as follows:

1952	$ 466,190
1953	534,608
1954	542,551
1955	271,783
1956	478,978
1957	596,313
1958	588,288
1959	574,544
1960-71	6,894,328
Total Avoidable Loss	$10,947,583

The proposed rate would provide revenues which cover the avoidable costs for all years from 1955 onwards. The basic principle followed in the schedule is to ascertain the expenditures that could have been or would be avoided if P. G. & E. were to abandon all service to Sierra. This approach is dictated by basic economic principles and sound business practices, since these are costs which must inescapably be taken into account in determining the dollars

Schedule 1—Sheet B

which will have to be laid out in order// to effect the service which is required. It is obvious that in such a determination the capital cost of facilities already installed which can be used only for rendering the particular service will be disregarded, since the money to provide such facilities has already been spent and no further outlay is required. On the other hand, every dollar outlay for future capital facilities which can be eliminated, if the service is not provided, must be taken into account.

As the schedule shows, the avoidable costs may be divided into two major categories. The first relates to the costs attributable to the transmission lines from P.G.&E.'s Drum

Power House Substation and Spaulding Substation to Donner Summit, the point of delivery to Sierra. These are lines which would be removed if service to Sierra were abandoned. The second is the cost of power production, consisting primarily of fuel costs which would be saved and the cost of generating capacity which would not be required on P. G. & E.'s system if Sierra's load were eliminated.

It will be noted that the power production costs have been based on the most recent steam-electric generating plants, these being the most economical and efficient plants on the system, and fairly representative of the facilities that would be eliminated if Sierra were not served. Since modern hydroelectric production is generally somewhat more costly than steam electric production it is unnecessary to consider

Schedule 1—Sheet C

hydro-electric // costs. There is practically no "spilled" water on P G. & E.'s hydro-electric system because of the increasing reliance on steam and the careful integration of steam and hydro production. Consequently, no energy delivered to Sierra can be considered to be generated by water that would otherwise be wasted.

The requirements for generating capacity on P. G. & E.'s system have grown at a rate on the order of 250,000 kilowatts a year for a number of years and at least this rate of growth is expected to continue into the future. Sierra's requirements from P. G. & E., currently on the order of 80,000 kilowatts, constitute only a fraction of this annual increase in P. G. & E.'s capacity requirements. It follows, therefore, that this is not a situation where P. G. & E. has been or will be supplying power to Sierra from generating capacity that otherwise would remain idle.

In order to maintain service to Sierra and supply Sierra's increasing load, as well as the growing load of its other customers, P. G. & E. has been installing, and will in the future install, large amounts of generating capacity. If service to Sierra were abandoned, these requirements for additional capacity could be cut back by the amount of Sierra's load. This means that P. G. & E.'s requirements for capital could be reduced accordingly. It is therefore a simple fact that, if service to Sierra were abandoned, all of the costs of capacity, including capital costs (i.e., depreciation, return and income tax), necessary for service to

Sierra would be eliminated. P. G. & E.'s // system costs would actually be less by the amount of such elimination if it were not necessary to serve Sierra.

No costs are included for transmission facilities on P. G. & E.'s integrated network (apart from transmission facilities required in connection with generating capacity, such as step-up transformers, etc.), since it is not practicable to determine readily what effect the elimination of Sierra's load would have on P. G. & E.'s provision for transmission facilities. It will be noted that no overhead costs, such as administrative and general expenses, have been included, except those that clearly would be eliminated if service to Sierra were abandoned.

It will be observed that the costs and revenues for the years 1959 to 1971 have been assumed to be constant. This assumption is based on the fact that the growth of Sierra's load indicates that its requirements for power, over and above its own generation and certain other minor sources, will reach the estimated maximum capacity of the three transmission lines over which P. G. & E. is obligated to render service by 1959. For the purpose of this study, therefore, it has been assumed that P. G. & E. will thereafter continue to supply power up to the amount of said estimated maximum capacity at a load factor of approximately 60%, this load factor being the estimated average load factor of Sierra's purchases from P. G. & E. in preceding years.

COSTS WHICH COULD BE ELIMINATED BY DISCONTINUING SERVICE TO SIERRA PACIFIC POWER COMPANY COMPARED WITH REVENUE UNDER CONTRACT RATE (FPC-3) AND PROPOSED RATE (FPC-3 SUPP. 1)

Schedule 1—Sheet 1

	1952 $	1953 $	1954 $	1955 $	1956 $	1957 $	1958 $	1959 $	1960-1971 (Each Year same as 1959) $	Total $
Eliminated Costs on Special Facilities serving Sierra Pacific										
Fixed Costs:										
Property Taxes	16,215	21,909	29,887	31,514	33,230	46,725	46,725	46,725	560,700	833,630
Rent	30,000	30,000	30,000	30,000	30,000	30,000	30,000	30,000	360,000	600,000
Insurance Injuries and Damages	1,652	2,209	2,070	1,654	1,658	1,665	1,665	1,665	19,980	34,218
Total Fixed Costs	47,867	54,118	61,957	63,168	64,888	78,390	78,390	78,390	940,680	1,467,848
Operating and Maintenance Costs:										
Maintenance	12,817	14,026	15,740	15,957	15,957	15,957	15,957	15,957	191,484	313,852
Operating Costs	24,170	25,073	26,477	27,239	27,239	27,239	27,239	27,239	326,868	538,783
Customer Accounting and Collecting	546	551	582	599	599	599	599	599	7,188	11,862
Social Security Taxes	721	517	689	706	706	706	706	706	8,472	13,929
Admin. & Gen. Excl. Franchise Requirements	3,655	4,047	4,316	3,919	3,919	3,919	3,919	3,919	47,028	78,641
Pensions	1,153	1,809	3,024	2,382	2,382	2,382	2,382	2,382	28,584	46,480
Total Operating and Maintenance Costs	43,062	46,023	50,828	50,802	50,802	50,802	50,802	50,802	609,624	1,003,547
Total Special Facilities Costs	90,929	100,141	112,785	113,970	115,690	129,192	129,192	129,192	1,550,304	2,471,395
Eliminated Production Costs based on most economical Steam Plant										
Incremental Cost of fuel and variable operative and maintenance costs	740,099	847,630	984,393	968,349	1,306,566	1,525,900	1,614,600	1,670,100	20,041,000	29,698,637
Capacity costs	863,300	969,900	1,137,800	1,136,000	1,257,600	1,399,400	1,444,900	1,444,900	17,338,800	26,992,600
Total eliminated costs	1,694,328	1,917,671	2,234,978	2,218,319	2,679,856	3,054,492	3,188,692	3,244,192	38,930,104	59,162,632
Revenue under Contract Rate	1,228,138	1,383,063	1,692,427	1,946,536	2,200,878	2,458,179	2,600,404	2,669,648	32,035,776	48,215,049
Revenue under Proposed Rate	1,570,892	1,772,041	2,173,409	2,504,241	2,834,566	3,168,677	3,353,249	3,443,362	41,320,344	62,140,781
Avoidable loss with revenue under Contract Rate	466,190	534,608	542,551	271,783	478,978	596,313	588,288	574,544	6,894,328	10,947,583
Avoidable loss with revenue under Proposed Rate	123,436	145,630	61,569	(285,922)	(154,710)	(114,185)	(164,557)	(199,170)	(2,390,240)	(2,978,149)

[2904]

Schedule 1—Sheet 2

DEVELOPMENT OF ELIMINATED CAPACITY COSTS

	Sum of Monthly Sierra Metered Kilowatt Demands at Time of PG&E Peak (1)	Sierra Kilowatt Demands at Primary Sub Input (2)	Sierra Kilowatt Demands at Generation (3)	Unit Capacity Cost Per Kilowatt Month at Generation (4)	Eliminated Capacity Cost (5)
1952	443,600	451,700	501,900	$1.72	$ 863,300
1953	497,900	507,500	563,900	$1.72	$ 969,900
1954	600,700	613,200	681,300	$1.67	$1,137,800
1955	693,600	710,000	788,900	$1.44	$1,136,000
1956	767,900	786,000	873,300	$1.44	$1,257,600
1957	854,400	874,600	971,800	$1.44	$1,399,400
1958	882,300	903,100	1,003,400	$1.44	$1,444,900
1959	882,300	903,100	1,003,400	$1.44	$1,444,900

Note:

Based on Contra Costa Units 1, 2 and 3 for 1952 and 1953; Based on Contra Costa Units 1, 2, 3, 4 and 5 for 1954; and on Pittsburg Units 1, 2, 3 and 4 thereafter; these being the most efficient and economical plants in operation during the periods considered.

[2905]

Schedule 1—Sheet 3

DEVELOPMENT OF UNIT CAPACITY COSTS

		Contra Costa Units 1-2-3 $	Contra Costa Units 1-2-3-4-5 $	Pittsburg Units 1-2-3-4 $
	FIXED COSTS			
1	Return at 5.5% on Depreciated Investment	2,564,540	4,015,385	4,550,315
2	Depreciation Expense	1,040,674	1,487,686	1,488,746
3	Insurance, Injuries and Damages	42,525	66,449	70,152
4	Property Taxes	957,142	1,471,756	854,986
5	Miscellaneous Revenue	(16,240)	(18,277)	(19,156)
6	Taxes Based on Income	1,399,007	2,823,325	3,199,448
7	Total Fixed Costs	5,987,648	9,846,324	10,144,491
	ALLOCATED OPERATING COSTS			
8	No Load Fuel	572,600	1,002,700	670,800
9	Maintenance (75%)	84,000	172,500	206,250
10	Other Operating Costs (75%)	322,623	406,076	332,860
11	Social Security Taxes (75%)	6,485	10,676	7,098
12	A & G Excl. Franchise Requirements (75%)	32,868	59,348	39,457
13	Pensions (75%)	10,359	36,062	23,975
14	Total Allocated Operating Costs	1,028,935	1,687,362	1,280,440
15	Total Capacity Costs	7,016,583	11,533,686	11,424,931
16	Normal Operating Capacity in KW	340,000	575,000	660,000
17	Capacity Cost in $ per KW Yr.	20.64	20.06	17.31
18	Capacity Cost in $ per KW Mo.	1.72	1.67	1.44

Schedule 1—Sheet 4

DETERMINATION OF INCREMENTAL COST OF FUEL AND VARIABLE GENERATION COSTS

		— Mills per Kilowatthour —				
Period (1)	Kwh (2)	Increm. Fuel Cost ⒶⒷ (3)	Variable O & MⒷ (4)	Total (5)	Total Cost—$ (6)	Annual Cost—$ (7)
1- 1-52 to 6-30-52	106,298,800	2.763	0.233	2.996	318,471	
7- 1-52 to 12-31-52	132,420,900	2.951	0.233	3.184	421,628	
Total 1952	238,719,700				740,099	740,099
1- 1-53 to 5-18-53	97,667,600	2.951	0.233	3.184	310,974	
5-19-53 to 7-26-53	50,185,300	3.139	0.233	3.372	169,225	
7-27-53 to 12-31-53	123,423,400	2.744	0.233	2.977	367,431	
Total 1953	271,276,300				847,630	847,630
1- 1-54 to 12-31-54	342,755,300	2.744	0.128	2.872	984,393	
Total 1954	342,755,300				984,393	984,393
1- 1-55 to 6-30-55	184,463,000	2.357	0.049	2.406	443,818	
7- 1-55 to 12-31-55	217,557,400	2.362	0.049	2.411	524,531	
Total 1955	402,020,400				968,349	968,349
1- 1-56 to 1-14-56	18,414,500	2.362	0.049	2.411	44,397	
1-15-56 to 2- 6-56	29,965,400	2.577	0.049	2.626	78,689	
2- 7-56 to 5- 8-56	104,917,600	2.649	0.049	2.698	283,068	
5- 9-56 to 5-27-56	19,456,300	2.792	0.049	2.841	55,275	
5-28-56 to 6-30-56	41,084,800	2.863	0.049	2.912	119,639	
7- 1-56 to 12-31-56	246,098,400	2.899	0.049	2.948	725,498	
Total 1956	459,937,000				1,306,566	1,306,566
1957	517,612,000	2.899	0.049	2.948	1,525,900	1,525,900
1958	547,680,000	2.899	0.049	2.948	1,614,600	1,614,600
1959	566,514,000	2.899	0.049	2.948	1,670,100	1,670,100
1960 - 1971	6,798,168,000	2.899	0.049	2.948	20,041,000	20,041,000
Total	10,144,682,700				29,698,637	29,698,637

Ⓐ Based on oil prices in effect during periods indicated (current prices assumed for the future).

Ⓑ Based on Contra Costa Units 1, 2 and 3 for 1952 and 1953 and based on Contra Costa Units 1, 2, 3, 4 and 5 for 1954 and on Pittsburg Units 1, 2, 3 and 4 thereafter, these being the most efficient and economical plants in operation during the periods considered.

[2907]

DETERMINATION OF ANNUAL GENERATION IN KILOWATTHOUR FOR SERVICE TO SIERRA PACIFIC POWER COMPANY

Schedule 1—Sheet 5

	Sales in Kilowatthours at Meter (1)	Sales in Kilowatthours at Primary Sub Input (2)	Sales in Kilowatthours at Generation (3)
1952	211,347,108	214,847,708	238,719,700
1953	239,942,952	244,148,652	271,276,300
1954	302,763,726	308,479,726	342,755,300
1955	354,322,596	361,818,396	402,020,400
1956	405,367,060*	413,943,000*	459,937,000
1957	456,200,000*	465,851,000*	517,612,000
1958	482,700,000*	492,912,000*	547,680,000
1959	499,300,000*	509,863,000*	566,514,000

Notes: *Estimated.

Column 2—Transmission losses from metering station to network grid, year 1956 and future years based on 1955 loss of 2.1155%.

Column 3—Sales at Primary Sub Input divided by 0.9.

[2908]

EXPLANATION OF ITEMS IN SCHEDULE 1

Schedule 1—Sheet 6

(a) Eliminated costs on special facilities serving Sierra Pacific.

The special facilities costs are the costs relating to the transmission lines from Drum and Spaulding to Donner Summit. The facilities include one 60,000 volt line from Spaulding to Summit and an additional line from Drum to Summit now operated at 60,000 volts, but in the process of being converted to a 110,000 volt line. Costs on the transformers and major switch gear equipment associated with these lines and installed at Drum and Spaulding are not included with those to be eliminated since it is assumed that they would be used elsewhere on the system to the extent that they are not necessary in their present location except for service to Sierra. Costs for removing these facilities have not been included.

Special facilities costs have been grouped into Fixed Costs and Operating and Maintenance Costs. Under Fixed Costs the item "Property Taxes" consists of the ad valorem taxes payable to local taxing authorities in respect to the three transmission lines. "Rent" consists of $30,000 per year paid to Sierra under the 1948 contract as consideration for the installation by Sierra of a 110,000 volt/60,000 volt substation in connection with the construction of the first 110,000 volt transmission line for P.G.&E.'s service to Sierra. The third and last item of Fixed Costs is "Insurance, Injuries, and Damages" which may be considered in the nature of insurance premiums for loss and liability on account of the three transmission lines.

Nothing has been included in Fixed Costs for depreciation expense, return on investment or taxes on income with respect to these three transmission lines. Depreciation does not represent a future outlay of money and hence is not an avoidable cost. Return on investment in the special facilities is obviously not an avoidable cost in this instance and therefore must be disregarded as must taxes on income which are related to return.

Salvage from removal of the three lines has been ignored. It is estimated that salvage would exceed cost of removal by approximately $220,000. This salvage recovery would be an added advantage to the Company if it abandoned service to Sierra. A study by the Company shows that this net salvage value would greatly exceed the cost of constructing a distribution line to serve Tamarack Substation, a very minor load of about 500 Kw now served from the Spaulding-Summit 60 Kv transmission line. There is no other service from the Drum and Spaulding-Summit lines apart from Sierra and the Tamarack Substation. For the foregoing reasons, both the salvaged item and the cost of the substitute line to Tamarack have been ignored in the calculation. Their inclusion would clearly increase the net avoidable cost.

Operating and maintenance costs on special facilities serving Sierra are virtually self-explanatory. They represent the cost of labor, materials and supplies necessary to operate and maintain the transmission lines and to handle the accounting and billing for this Sierra service. The "Social Security taxes" and "pensions" are costs associated with labor and are essentially additional costs of labor. "Administrative and General" excluding franchise requirements represents an allocated amount of General Office salaries and expenses, communication equipment maintenance, General Office supplies, etc., associated with labor.

Schedule 1—Sheet 7

(b) Eliminated Production Costs based on most economical steam plant.

Production costs which would be eliminated if Sierra service were dropped are the costs of generating capacity which would not have been or would not be installed on the P.G.&E. System if Sierra's load requirements did not have to be met. These costs are based on those of the most recent plants which are also the most efficient and economical steam electric generating plants in operation during each of the years in the study. In order to determine the actual amount of capacity which would be released by Sierra, the amount of Sierra's demand at the time of each monthly peak on P.G.&E.'s system has been ascertained. These amounts represent the actual additions to P.G.&E.'s monthly peak by Sierra's load. As we have previously shown (see Exhibit 41 and testimony with respect thereto tr. pages 1276-1283), P.G.&E.'s capacity requirements must be determined on a monthly basis and the system planning is actually done on a monthly basis. The capacity costs per Kw month are derived on Sheet 3. They are based on Contra Costa Units 1, 2 and 3 for 1952 and 1953 and on Contra Costa Units 1, 2, 3, 4 and 5 for 1954, and on Pittsburg Units 1, 2, 3 and 4 thereafter, these being the most efficient and economical plants in operation during the periods considered. Fixed costs on these units include the return, depreciation and income taxes. These fixed charges must be earned in order to obtain the capital necessary to construct the generating capacity. Operating costs include 75% of the annual amounts since the remaining 25% is considered to be attributable to the cost of energy production rather than to the cost of providing capacity. The unit capacity costs per Kw month of Sheet 3 are applied to the sum of monthly Sierra Kw demands at time of P.G.&E.'s system peak referred to generation as shown on Sheet 2 in developing the amounts of eliminated capacity costs by years.

Incremental cost of fuel and variable operating and maintenance costs are developed on Sheet 4. The principal component of these costs is the incremental cost of fuel in effect from time to time in the period of the study. The remaining component of variable cost represents the 25% of operating cost considered to be attributable to the cost of energy production. The amounts of Kwh to which the unit fuel and variable operating and maintenance costs are applied are derived from the sales and Kwh at the delivery point to Sierra, adjusted to reflect losses to generation as developed on Sheet 5.

Total costs to be eliminated if the Sierra load were to be dropped are the amounts by years shown on Sheet 1 comprising the sum of total special facilities costs, incremental cost of fuel and variable operating and maintenance costs and capacity costs. The amounts of these total eliminated costs by years are compared with revenue under the contract rate (FPC 3) and proposed rate (FPC 3, Supplement No. 1) to obtain the avoidable loss by years under each rate.

[2910]

PACIFIC GAS AND ELECTRIC COMPANY—ELECTRIC DEPARTMENT

REVENUES, EXPENSES, NET FOR RETURN, AND RATE OF RETURN

1955 Recorded and 1956 Estimated

Schedule 2—Sheet 1

(In Thousands of Dollars)

	1955 Recorded	1956 Estimated
Gross Operating Revenue	290,093	297,708
Operating Expenses:		
Maintenance—Production	3,157	4,152
—Transmission	678	1,215
—Distribution	5,791	6,483
Total Maintenance	9,626	11,850
Purchased Power	2,918	4,718
Natural Gas Purchased	27,359	25,785
Oil and Other Fuel	12,053	16,959
Water for Power (Hydraulic)	342	442
Other Production	8,250	8,105
Transmission	2,180	2,195
Distribution	12,867	12,872
Customers' Accounting & Collecting	8,792	8,925
Sales Promotion	2,231	2,405
Sub-Total	86,618	94,256
Administrative & General	5,786	6,445
Pensions	2,706	3,434
Insurance	496	550
Casualty loss, storm damage	1,553	
Injuries & Damages	739	728
Uncollectibles	592	582
Sub-Total	11,872	11,739
Taxes:		
City and County	33,270	34,302
Unemployment—Federal	61	74
—State	154	352
Old Age Benefits	587	707
Amortization of Tax Deficiency	558	558
State Corporation Franchise	4,018	3,761
Federal Income	49,188	45,981
Total Taxes	87,836	85,735
Depreciation:		
Annuity	21,759	28,257
Interest on Reserve	10,771	5,822
Total Depreciation	32,530	34,079
Total Operating Expenses	218,856	225,809
Net for Return	71,237	71,899
Rate Base—Depreciated	1,302,488	1,382,322
Rate of Return—%	5.47%	5.20%

See Sheet 4 for Notes.

[2911]

PACIFIC GAS AND ELECTRIC COMPANY—
ELECTRIC DEPARTMENT
DETAIL OF REVENUES, SALES, AND AVERAGE CUSTOMERS

1955 Recorded and 1956 Estimated

Schedule 2—Sheet 2

	1955 Recorded	1956 Estimated
Revenues in Thousands of Dollars		
Domestic Service	96,002	100,913
Commercial and Industrial	129,087	134,360
Agricultural Power	39,511	40,280
Street Lighting	4,026	4,296
Resale	13,378	9,717
Railway	302	297
Interdepartmental	580	604
Miscellaneous Revenues	7,207	7,241
Gross Revenues	290,093	297,708
Sales in Millions of Kwh's		
Domestic Service	3,500.5	3,742.3
Commercial and Industrial	8,000.2	8,439.2
Agricultural Power	3,115.7	3,169.5
Street Lighting	108.1	116.8
Resale	1,644.6	1,272.6
Railway	20.6	20.0
Interdepartmental	29.6	30.0
Total Sales	16,419.3	16,790.4
Average Customers		
Domestic Service	1,338,068	1,397,083
Commercial and Industrial	251,884	256,017
Agricultural Power	68,377	70,437
Street Lighting	885	910
Resale	28	29
Railway	5	5
Total Average Customers	1,659,247	1,724,481

See Sheet 4 for Notes.

[2912]

PACIFIC GAS AND ELECTRIC COMPANY—ELECTRIC DEPARTMENT

WEIGHTED AVERAGE DEPRCIATED RATE BASES

Year 1955 Actual, 1956 Estimated

Schedule 2—Sheet 3

(In Thousands of Dollars)

	1955	1956
Intangible Plant		
Franchises and Consents	481	480
Miscellaneous Intangible Plant	20	20
Total Intangible Plant	501	500
Tangible Plant		
Departmental	1,497,661	1,598,404
Common Utility Plant—Pro Rata	43,435	47,533
Customers' Advances for Construction	(2,335)	(2,667)
Contributions in Aid of Construction	(7,119)	(8,076)
Motor Vehicle Depreciation	(980)	(1,041)
Total Tangible Plant	1,530,662	1,634,153
Working Capital		
Material and Supplies	10,362	12,128
Working Cash	34,229	34,229
Total Working Capital	44,591	46,357
Total Weighted Average Rate Base:		
Undepreciated	1,575,754	1,681,010
Deduct Weighted Average Depreciation Reserve	273,266	298,688
Depreciated Rate Base	1,302,488	1,382,322

[2913]

NOTES

Schedule 2—Sheet 4

(a) All amounts shown for the year 1955 are recorded book amounts except as noted under Item (e) below.

(b) Revenues and expenses for 1956 are estimated on an average year basis.

(c) Oil is priced at $2.20 per bbl., f.o.b. tank cars, Richmond, for the year 1956.

(d) Labor costs are at 1955 levels.

(e) Taxes based on income are computed on the tabulated revenues and expenses shown, together with other allowable income additions and deductions.

(f) The estimate of Administrative and General expense for the Electric Department for 1956 includes $561,000 for the cost of the Company's participation in the research and development work being done by the Nuclear Power Company group.

(g) Depreciation expense for 1955 is included on the 4% sinking fund remaining life basis as authorized by the CPUC for use on the Company books in 1955. Depreciation expense for 1956 has been computed on a 2% sinking fund remaining life basis using lives, rates, and other conditions tentatively agreed upon by representatives of the Company and the CPUC staff.

[2914]

EXPLANATION OF ITEMS IN SCHEDULE 2

Schedule 2—Sheet 5

The tabulation on Sheet 1 of Schedule 2 shows the rate of return of the Electric Department of the Pacific Gas and Electric Company for the year 1955 as recorded and for the year 1956 as estimated.

All revenues and expenses shown for the year 1955 are recorded amounts except that: (a) taxes based on income are included here as computed on the revenues and expenses shown, together with other income additions and deductions required and allowed for determination of tax liability, and (b) depreciation expense differs from the book figures in that it includes no amount for amortization of plant acquisition adjustments.

The revenue and expense estimates for 1956 are based on average conditions of temperature and precipitation, budget amounts for most maintenance and operating expenses, and the other conditions enumerated in the notes on Sheet 4. Ad valorem taxes have been included as estimated on a fiscal year basis as authorized by Decision No. 53022 of the California Public Utilities Commission, rather than on the calendar basis as used on the Company books in 1955.

Sheet 2 contains a detail, by classes, of the revenues which are shown in total on Sheet 1. It also shows, by classes, the corresponding kilowatt hour sales and average number of customers.

Details of the rate bases are shown on Sheet 3. All amounts for 1955 are based on recorded figures for the year. Working cash has been computed substantially in accordance with the method used by the Staff of the California Public Utilities Commission (with minor modifications) in P.G.&E. Co.'s Application No. 36635, CPUC Decision No. 51360, dated April 19, 1955. The rate base for 1956 was developed in a manner similar to that for 1955. The increase over 1955 is caused largely by the full-year operation of construction projects that were underway in 1955 but in operation for only a portion of the year, and a time-weighted average of new construction estimated to become operative during 1956.

The results of this analysis, as shown on Sheet 1, indicate that on the bases described in the foregoing, the rate of return for the Electric Department of the Pacific Gas and Electric Company was 5.47% in 1955 and is estimated to be 5.20% in 1956.

[2915]

SIERRA PACIFIC POWER COMPANY—ELECTRIC DEPARTMENT

ESTIMATED RATE OF RETURN

Years 1954 and 1955

Schedule 3—Sheet 1

(In Thousands of Dollars)

	1955	1954
Revenues (a)	6,783	6,069
Expenses		
Maintenance	322	272
Purchased Power	2,513	2,182
Other Production	90	80
Transmission	13	15
Distribution	247	230
Accounting and Collecting	193	204
Sales Promotion	62	62
Sub-total	3,440	3,045
Administrative and General	345	381
Pensions	104	95
Insurance	22	20
Injuries and Damages	26	25
Sub-total	497	521
Total excl. Taxes and Depreciation (b)	3,937	3,566
Taxes		
Ad valorem	381	297
Unemployment—Federal	2	2
—State	3	3
Federal Old Age Benefits	15	12
State Corporation Franchise	8	9
Federal Income	741	634
Franchise payments	15	14
Total Taxes (c)	1,165	970
Depreciation (d)	515	484
Total Operating Expenses	5,617	5,020
Net for Return	1,166	1,049
Rate Base (depreciated)	18,654	17,231
Rate of Return	6.25%	6.09%
Increase in net if power purchased from P G & E had been at rate before increase (Contract Rate FPC 3)		
Decrease in cost of purchased power	(558)	(481)
Increase in income tax @ 52%	290	250
Increase in net for return	268	231
Net for return	1,434	1,280
Rate of return	7.69%	7.43%

See Sheet 2 for Notes

[2916]

SIERRA PACIFIC POWER COMPANY—ELECTRIC DEPARTMENT

ESTIMATED RATE OF RETURN

Years 1954 and 1955

ESTIMATED RATE BASES

Schedule 3—Sheet 2

(In Thousands of Dollars)

	1955(e)	1954(e)
Historical Plant Capital	20,954	19,334
Estimated Average Operative Construction Work in Progress	314	346
Customers advances for construction	(729)	(795)
Contributions in aid of construction	(139)	(140)
Sub-total	20,400	18,745
Materials and supplies	623	521
Working Cash (f)	405	360
Sub-total	1,028	881
Total	21,428	19,626
Less depreciation reserve balance, average for year	2,774	2,395
Total depreciated rate base	18,654	17,231

NOTES

Sheet 1

Source:

(a) Annual Reports to California Public Utilities Commission, Page 69.

(b) Annual Reports to California Public Utilities Commission, Page 81.

(c) Annual Reports to California Public Utilities Commission, Page 43A.

(d) Annual Reports to California Public Utilities Commission, Page 89.

Sheet 2

(e) All amounts are averages of beginning and end of year figures and are derived from information in the Company's Annual Report to the CPUC.

(f) Estimated at 1/12 of purchased power and 1/6 of all other maintenance and operating expenses exclusive of pension expense, accruals to reserves, taxes, and depreciation.

[2917]

EXPLANATION OF ITEMS IN SCHEDULE 3

Schedule 3—Sheet 3

The tabulation on Sheet 1 of Schedule 3 shows the estimated rate of return earned by the Electric Department of the Sierra Pacific Power Company for the years 1955 and 1954. All revenue and expense items shown are derived entirely from data contained in that company's annual report to the California Public Utilities Commission. To the extent that any of these figures include allocations of total company charges, it has been assumed that the allocations used by the company on its books, and accordingly included in the amounts shown in its annual report, are suitable for rate of return determination.

The development of the rate base is shown in some detail on Sheet 2 of Schedule 3. All items shown there are averages of beginning and end-of-year amounts. An explanation of certain figures, not obtainable directly from the reports to the CPUC may be of interest. The amount shown for construction Work in Progress is an estimate of that portion of the total Electric Department construction Work in Progress that is believed to be operative during the year. This estimate is based on the type of work involved on each job listed (Production, transmission, or distribution), and the amount of money to be spent as of the end of the year to complete the job. If expenditures were nearly completed it was assumed that the job was operative. Customers Advances for Construction is shown in the report to the CPUC for the total company only. For developing this Electric Department rate base the company total was allocated to departments on a capital basis. All materials and supplies listed in the report to the CPUC as being "predominately for the Electric Department" were included in this Rate Base. Working cash was determined as indicated in the note on Sheet 2. It is believed that the rate base developed as outlined above is reasonable and that it is a maximum base because questionable items have been treated so as to increase the amount assigned to the Electric Department.

The results of this analysis show that including in expenses the actual costs of power purchased from the PG&E Company, the Electric Department of the Sierra Pacific Power Company earned a return of not less than 6¼% in 1955 and 6.09% in 1954. At the bottom of Sheet 1, Schedule 3, is an adjustment to show what the rate of return would have been had the contract rate (FPC-3) been in effect for both years. Under this condition the rates of return would have been approximately 7.69% for 1955 and 7.43% for 1954.

[2918]

Table showing the comparative rates of return to P. G. & E. from sales to California Oregon Power Company and Sierra, the only sales subject to the jurisdiction of the F. P. C.

The data in Schedule 4 show the reasonable rate of return from California Oregon as of 1955 is diluted to below a reasonable rate of return when combined with unreasonable and confiscatory rate of return from Sierra, and shows that P. G. & E.'s other jurisdictional business does not offset unreasonable Sierra rate so as to produce overall reasonable return on P. G. & E.'s interstate wholesale service.

[2919]

PACIFIC GAS AND ELECTRIC COMPANY SUMMARY AND DERIVATION OF RATE OF RETURN RECEIVED FROM CALIFORNIA OREGON POWER COMPANY, SIERRA PACIFIC POWER COMPANY, AND SIERRA AND COPCO, COMBINED

Schedule 4—Sheet 1

		California Oregon Power Company			Sierra Pacific Power Company			Sierra and Copco Combined		
		1953	1954	1955	1953	1954	1955	1953	1954	1955
1	Sales in Kwh	65,974,800	68,791,200	91,716,000	239,942,952	302,763,726	354,322,596	305,857,752	371,554,926	440,038,596
2	Demand in KwMo	166,080	301,190	529,010	553,080	664,286	752,651	719,160	965,476	1,281,661
3	Fixed Cost (Excluding Return and Taxes on Income)	$ 128,088	$ 251,725	$ 446,869	$ 507,085	$ 649,005	$ 735,098	$ 635,173	$ 900,730	$ 1,181,967
4	Operating and Maintenance Costs	190,515	201,657	284,851	762,861	967,694	1,187,241	953,376	1,169,351	1,472,092
5	Total Costs	$ 318,603	$ 453,382	$ 731,720	$ 1,269,946	$ 1,616,699	$ 1,922,339	$ 1,588,549	$ 2,070,081	$ 2,654,059
6	Revenue ①	543,081	910,230	1,761,492	1,383,063	1,692,427	1,946,536	1,926,144	2,602,657	3,708,028
7	②	—	—	—	1,772,041	2,173,409	2,504,241	2,315,122	3,083,639	4,265,733
8	Amount Available for Return ①	224,478	456,848	1,029,772	113,117	75,728	24,197	337,595	532,576	1,053,969
9	and Taxes on Income ②	—	—	—	502,095	556,710	581,902	726,573	1,013,558	1,611,674
10	Income Tax ①	85,364	175,887	442,160	—	—	—	3,078	34,604	269,494
11	②	—	—	—	127,450	118,123	126,085	212,815	294,010	570,209
12	Return ①	139,114	280,961	587,612	113,117	75,728	24,197	334,517	497,912	784,475
13	②	—	—	—	374,645	438,587	455,817	513,758	719,548	1,041,465
14	Rate Base—Depreciated	$2,861,659	$5,414,203	$9,728,337	$11,493,481	$13,992,000	$15,980,410	$14,355,140	$19,406,203	$25,708,747
15	Rate of Return ①	4.86%	5.19%	6.04%	0.98%	0.54%	0.15%	2.33%	2.57%	3.05%
16	②	—	—	—	3.26%	3.13%	2.85%	3.58%	3.71%	4.05%

Note:

① Contract Rate—FPC-3 for Sierra, Modified Schedule R for Copco, FPC-7 Supp. 1.

② Proposed Rate—FPC-3 Supp. 1 for Sierra.

[No Number]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

In the Matters of	
PACIFIC GAS AND ELECTRIC COMPANY	Docket No. E-6482
SIERRA PACIFIC POWER COMPANY	Docket No. E-6697

Order Denying Application for Rehearing, Stay, Oral Argument, and Other Relief

*　*　*　*　*　*　*

[3144]

[Title of Commission and Cause Omitted]

Before Commissioners: Frederick Stueck, Acting Chairman; Seaborn L. Digby, William R. Connolo and Arthur Kline.

ORDER DENYING APPLICATION FOR REHEARING, STAY, ORAL ARGUMENT, AND OTHER RELIEF

(Issued September 5, 1957)

Pacific Gas and Electric Company (PG&E), on August 9, 1957 filed an application for rehearing of our order issued July 10, 1057, in the above-entitled matters. On August 12, 1957, PG&E filed an amendment to that application. Among other things, our July 10, 1957, order (1) denied PG&E's motions filed herein on June 11, 1956, and October 15, 1956, for a reopening of Docket No. E-6482 and further Commission proceedings and findings in respect to PG&E's increased rate for wholesale electric service rendered to the Sierra Pacific Power Company (Sierra), which our order of June 17, 1954,[1] would have allowed if it had not been set aside by the Courts,[2] and (2) directed PG&E to cease and desist from billing or demanding from Sierra charges computed at rates other than those embodied in PG&E's Rate Schedule FPC No. 3 unless and until such schedule be lawfully superseded. PG&E now seeks Commission reconsideration and stay of that order, further hearings and findings, and opportunity to present oral argument before the Commission in support of the subject application.

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[1] *In the Matter of Pacific Gas and Electric Company,* 7 PUR 3d 256, Op. No. 270, Docket No. E-6482.

[2] *Sierra Pacific Power Co. v. F.P.C.,* 223 F.2d 605, affirmed 350 U.S. 348.

Our consideration of the assignments of error, and the grounds or bases of PG&E's August 9, 1957, application for rehearing, as amended, leads us to the conclusion that no new facts and no new principles of law have been set forth which either were not considered by the Commission when it adopted the aforementioned order issued July 10, 1957, or which now having been considered, warrant any change or modification thereof. Basically, the subject application proceeds upon the same contentions and arguments which were advanced heretofore by PG&E in this matter.

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Accordingly, we do // not find it necessary to undertake, at this time, a review of all of the findings and conclusions expressed in our July 10, 1957, order. However, we do think the following additional comments are appropriate in view of two procedural arguments raised in PG&E's application for rehearing.

PG&E argues that it was unjustifiably denied a hearing in regard to both of its principal contentions. Specifically, it alleges that the Commission erred "in not odering a hearing so that it could make a finding on the specific meaning of the 1948 [PG&E-Sierra] contract" as to whether the rate provisions thereof (a) bind the contracting parties to a definite and specific rate fixed for a definite and specific term unless changed by mutual agreement of the contracting parties or by action of the Commission pursuant to Section 206 of the Federal Power Act, or (b) contemplate and permit the filing of unilateral changes therein pursuant to Section 205 (d) of the Act in the manner previously followed by PG&E. PG&E further alleges that the Commission erred "in not granting a hearing to determine whether the Sierra [1948 contract] rate is adverse to the public interest" within the meaning of the Supreme Court's decision in this matter.

We afforded PG&E and Sierra full opportunity to support their respective positions in this case with written showings of any facts and statements of any argument they might wish to adduce therefor prior to the taking of any action in respect to the merits of PG&E's motions. PG&E filed such supporting statements on October 15, 1956, and December 3, 1956, and Sierra filed its statements on November 15, 1956, and December 10, 1956, as indicated in our July 10, 1957, order. That procedure was suggested by PG&E's counsel and concurred in by counsel for Sierra.

As those submissions show, in addition to legal argument and citations of legal authority, each company submitted factual data in support of its respective position; which legal and factual showings relate to both of PG&E's principal contentions referred to above.

Only then did we act upon the merits of PG&E's motions. As indicated in our July 10, 1957, order, in neither case do we find sufficient justification for further Commission proceedings. In regard to PG&E's first contention, it is our conclusion that in the present posture of this case, the Supreme Court's decision herein must be taken as determining that the 1948 PG&E-Sierra contract binds the parties thereto to a definite and specific rate fixed for a definite and specific term unless changed by mutual agreement of those parties or by action of this Commission pursuant to Section 206 of the Act. Furthermore, action under that section

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being // a matter wholly within the discretion of the Commission upon the facts of the particular case, it is our further conclusion that the factual bases adduced by PG&E in support of the alleged adverse effects of the 1948 contract rates upon the public interest do not appear to be of a nature which would compel or warrant further examination or investigation by the Commission at this time.

In regard to PG&E's current request for stay, hearings and findings, and opportunity for oral argument on its application for rehearing, it is our further opinion, from what we have said herein, that no sufficient justification for the granting of such requests has been shown.

In the light of the entire record and upon reconsideration of all the issues presented, we again conclude that our order issued July 10, 1957, clearly disposed of all the material issues of fact, law, and discretion presented herein, and that the relevant evidence provides substantial support for our determination. Accordingly, PG&E's application for rehearing, stay, oral argument and other relief filed on August 9, 1957, as amended August 12, 1957, should be denied as hereinafter ordered as being necessary and appropriate for the purposes of the Federal Power Act.

The Commission orders:

The application for rehearing of our order issued July 10, 1957, in these dockets, filed by PG&E on August 9, 1957, as amended August 12, 1957, hereby is denied.

By the Commission.

MICHAEL J. FARRELL,
Acting Secretary.

[2926]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

In the Matters of PACIFIC GAS AND ELECTRIC COMPANY SIERRA PACIFIC POWER COMPANY	Docket No. E-6482 Docket No. E-6697

Reply of Sierra Pacific Power Company To Submission of Pacific Gas and Electric Company

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* * * * * * *

[2931]

[Title of Commission and Cause Omitted]

REPLY OF SIERRA PACIFIC POWER COMPANY TO SUBMISSION OF PACIFIC GAS AND ELECTRIC COMPANY

The Issue Now before the Commission.

In its answer to Pacific Gas and Electric Company's [PG&E's] motion to reopen, filed on June 28, 1956 in Docket No. E-6482, Sierra Pacific Power Company [Sierra] pointed out that under the Supreme Court's decision,[1]

[2932]

whether or not the // Commission should hold further hearings was entirely a matter to be decided by the Commission in its own discretion, and argued that the Commission should deny PG&E's motion requesting that it hold such hearings unless PG&E was able to show some merit to its contention that the 1948 contract rate was adverse to the public interest.

In that answer, as well as in its supplemental answer filed on July 18, 1956, Sierra also demonstrated, both on the record now before the Commission and on the basis of public statements issued by PG&E, that PG&E's contentions that the rate specified in the 1948 contract was or is now so low as to adversely affect the public interest were frivolous and sham. When PG&E requested leave to reply to Sierra's answers, Sierra wrote the Commission on August 2, 1956, joining in PG&E's request on the ground that it was confident that any such reply would conclusively demonstrate that the contract rate has never been adverse to the public interest, and would therefore enable the Commission to dispose of the issues raised by PG&E on the basis of its own presentation, without the necessity of entering upon any further hearings.

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[1] *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) affirming *Sierra Pacific Power Co. v. Federal Power Comm'n*, 223 F.2d 605 (D.C. Cir. 1955), which set aside the order accompanying F.P.C. opinion No. 270 issued June 17, 1954 in *In the Matter of Pacific Gas and Electric Company*, Docket No. E-6482.

By its order issued September 7, 1956, the Commission permitted PG&E to reply to Sierra's answers, but directed PG&E to show "in what particulars, if any" it claimed that the contract rate was or is "so low * * * as to adversely

affect the public interest." It seems clear, therefore, that the issue now before the Commission is whether or not PG&E has shown that it is "desirable"[2] that the Commission should hold further hearings. This reply is directed to that issue.

Outline of Sierra's Contentions.

Sierra's confidence has been more than justified by the "Submission" and supplemental motion to reopen, filed by PG&E. For in those documents, recognizing the impossibility of complying with the Commission's direction, PG&E resorts to the desperate expedient of raising an entirely new "basic contention" so fantastic in nature that it is difficult to believe it could be seriously advanced: After three and a half years of litigation, culminating in a decision by the Supreme Court of the United States that PG&E could not lawfully increase the rate embodied in the contract without Sierra's consent, PG&E now asks the Commission to find, primarily on the basis of the same record that was before the Supreme Court, that as a matter of fact there never was any such contract, anyway, and that therefore the Supreme Court's decision "does not apply"! (PG&E Submission [Sub.], p. 33.) Aside from the fact that such a contention [2934] has no // bearing on whether the contract rate is adverse to the public interest, it would seem to require no argument to show that no such issue can be raised now in the face of the Supreme Court's decision that as between PG&E and Sierra the contract is binding in accordance with its terms. PG&E's supplemental motion is a bare-faced request to the Commission to reopen the entire proceeding and reverse the Supreme Court, both on the law and the facts.

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[2] *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).

It is also apparent from PG&E's Submission that it raised this preposterous "basic contention" in a desparate effort to overcome its manifest inability to produce a single fact or argument either in refutation of Sierra's answers, or in support of its own assertions that the contract rate is and has been so low as to adversely affect the public interest. All it can advance is an involved and complicated argument which upon analysis will be found not to refute but to *support* Sierra's contention that the contract does not and in the foreseeable future cannot adversely affect the public interest. PG&E's elaborate argument regarding its alleged "avoidable" or "out-of-pocket" costs is shown by analysis to be no more than a demonstration of the obvious fact that PG&E would make more money if it sold the electric energy [2935] which it now sells to Sierra at the contract rate, to // other customers at a rate producing a return after income taxes of 5½%. That we concede, but the Supreme Court has held that it is immaterial.

PG&E's contention that its "loss" under this contract, however infinitesimal in relation to PG&E's total earnings, might conceivably increase PG&E's "cost of money" to an infinitesimal degree and thereby cast an excessive burden upon PG&E's other consumers, ignores the fact that under the practices of both the Public Utilities Commission of the State of California and of this Commission the rates to PG&E's other consumers will be so fixed as to assure that *any* "loss" of revenue resulting from this contract will be borne exclusively by PG&E's stockholders and not by its other consumers. In the face of this basic fact, it becomes abundantly apparent that PG&E's contention that the burden of the deficiency is borne by PG&E's other consumers, and is therefore unduly discriminatory as against them, is sham and frivolous, as we asserted in our principal answer.

It should also be noted that PG&E appears to have abandoned its contention that the contract has been against the public interest in the past. For even if its contentions regarding its cost of money had any validity, PG&E's argument goes no further than to assert that the low contract rate might "ultimately" (Sub., p. 40), by the process of

[2936]

"slow // and insidious attrition" (Sub., p. 36), place a burden on other customers. There is not a suggestion in PG&E's Submission that any such burden has been placed upon other customers in the past and, of course, it is apparent from Sierra's original answer and the exhibit annexed thereto that such is not the fact. Accordingly, it is unnecessary to discuss further PG&E's contentions regarding the alleged retroactive effect of the *Atlantic*[3] and *Morgan*[4] cases. For the doctrine which PG&E erroneously contends that they established would not be applicable, even if there were such a doctrine.

We submit, therefore, that on the basis of PG&E's own Submission, read in the light of the record before the Commission, the Commission is amply justified in finding that the contract is not against the public interest, and in denying PG&E's motion to reopen, on the merits.

While we think the lack of merit in PG&E's contentions is apparent from a mere reading of its Submission, nevertheless, that document contains so many inaccurate, misleading and confusing statements, both of fact and law, that Sierra deems is necessary to reply in some detail.[5]

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[3] *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301 (1935).

[4] *Morgan v. United States*, 304 U.S. 1 (1938); *United States v. Morgan*, 307 U.S. 183 (1939); *United States v. Morgan*, 313 U.S. 409 (1941).

[5] "Tr." and "Ex." citations herein are to the transcript and exhibits of the record in Docket No. E-6482. Citations herein to a brief ("Br.") are to one of the several briefs in that docket or on review of the final order therein and are accompanied by abbreviations designating the party filing, the tribunal, and whether an opening ("Op.") or reply ("R.") brief.

[2937]

I.

PG&E's Belated "Basic Contention" That It Was the "Understanding of the Parties" That the Contract Does Not Provide for a "Firm Rate" Is Barred by the Supreme Court's Decision as Well as by the Parol Evidence Rule. PG&E Is Attempting to Reargue the Entire Case and Persuade This Commission to Reverse the Supreme Court, Both on the Law and on the Facts.

According to PG&E's Submission, its "basic contention" (Sub., p. 17) is no longer that the contract rate is or has been so low as to be adverse to the public interest, which was the only issue as to which the matter was permissively remanded to this Commission by the Court and as to which PG&E was directed to address itself by the Commission's order of September 7, 1956. Instead, PG&E now asserts that its "basic contention" is that the contract rate "was not meant to be firm for fifteen years or longer but was meant to be subject to change upward or downward to reflect changes in PG&E's cost of service" (PG&E's Supp. Motion, p. 2).

In support of this fantastic "basic contention" PG&E first cites its review of the evidence in this proceeding contained in its briefs on the prior hearings before the Commission, and secondly, offers to produce additional (and purely cu-

[2938]

mulative) // parol evidence of an alleged oral side agreement between the presidents of PG&E and Sierra prior to the signing of the contract, to the effect it was "understood" that the contract did not mean what it said (Sub., pp. 27-28;

Supp. Motion, pp. 4-5).[6] On this basis, it asserts that "it is readily demonstrable that the 1948 contract rate is not one for a firm rate" (Sub., p. 25).

PG&E asserts that while it advanced this contention before the Commission, the Commission "considered it unnecessary to decide this issue and made no finding on it" and that therefore, although the Supreme Court "had to *assume* for purposes of its opinion that the contract was for a firm rate, the Court did not *decide* that such was the nature of the rate" (Supp. Motion, pp. 2-3). Thus, according to PG&E, the issue as to the "meaning of the contract" (Supp. Motion, p. 5) is still open, and if the Commission sustains this "basic contention" this "would completely dispose of the case, for the Commission has already * * * found the old rate 'unreasonable' and the new one 'reasonable' according to the usual concepts * * *" (Sub., p. 17). Indeed, PG&E

goes so far as to assert on the basis // of this "contention", that "the rationale of the Supreme Court's Sierra decision thus clearly does not apply to the contract which was actually made and fully understood by the parties" (Sub., pp. 32-33).

To this fantastic contention there are three separate and complete answers: (a) It is no more than an attempt to reverse the decision of the Supreme Court on the merits; (b) as PG&E itself correctly argued before the Commission, the plain provisions of the contract cannot be varied by parol evidence; and (c) every factual issue relating to the

---

[6] The "meaning" of the contract could not be more clearly expressed:

"4. For *all* electric energy delivered hereunder, Sierra will pay Pacific in accordance with the following schedule of rates: * * *" (Ex. 5, 4th contract, p. 3.) (Emphasis added.)

"intent" or "understanding" of the parties, as well as the conclusion PG&E seeks to draw therefrom regarding the meaning of the contract, which PG&E presented before the Commission, was presented in almost the identical words to the Supreme Court, and decided against PG&E's contentions in every respect.

We shall also show that, while it is not material, as a matter of fact there was not and could not have been any such oral agreement or "understanding" as PG&E now asserts.

[2940]

A.

PG&E's supplemental motion is nothing more than a request to this Commission to reverse the Supreme Court on the merits.

In *F. P. C. v. Sierra Pacific Power Co.,* 350 U.S. 348 (1956), the Supreme Court held that "PG&E offered Sierra a 15-year contract for power at a special low rate, which offer Sierra finally accepted" (350 U.S. at 352), that PG&E did not have the right to increase that rate unilaterally, and that therefore "neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra" (350 U.S. at 353). PG&E now asks the Commission to find, on the basis of the very same record that was before the Supreme Court (reinforced by further parol evidence to the same effect), that PG&E did not offer Sierra a 15-year contract at a special low rate and that therefore it *did* have the right to increase the contract rate unilaterally all the time. Accordingly, says PG&E, its filing of the new rate and the Commission's finding that the new rate was not unlawful *were* effective to change the contract rate, the Supreme Court's decision to the contrary notwithstanding.

This is but an attempt to have this Commission reverse the Supreme Court on the merits. What PG&E is really saying is that when in its petition for certiorari it asked the Court to decide whether the rate filing procedure of the Federal Power Act applies "to Petitioner's rate for electric power service to Sierra Pacific Power Company, such rate being embodied in the contract between the two companies" (Pet. for Cert., p. 2), it had its fingers crossed, and, as a matter of fact, the record showed that the rate was not "embodied in the contract".

We do not think the Supreme Court would take kindly to such a suggestion. Surely, PG&E's counsel is aware that the Court will not hear or pass upon moot questions.[7] Nor will it permit a litigant to prosecute or defend a cause of action on one theory, reserving a different theory as a "sleeper", to be raised later if its first theory should be rejected. For example, in *Chicot County Dist. v. Baxter State Bank,* 308 U.S. 371 (1940), a prior decree had cancelled certain bonds and enjoined the holders from asserting any claim on them. Subsequently, in a different suit, the Supreme Court held

that the statute under which the prior // decree had been entered was unconstitutional. In a still later proceeding to recover on the bonds, founded on the theory that the prior decree was void because entered upon an unconstitutional statute, the Court said:

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[7] *E.g., Bus Employees v. Wisconsin Board,* 340 U.S. 416 (1951); *St. Pierre v. United States,* 319 U.S. 41 (1943).

> "* * * As parties, these bondholders had full opportunity to present any objections to the proceeding, not only as to its regularity, or the fairness of the proposed plan of readjustment, or the propriety of the terms of the decree, but also as to the validity of the statute under which the proceeding was brought and the plan put into effect. Apparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid." (308 U.S. at 375)
>
> * * * * * * *
>
> "The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' *Grubb v. Public Utilities Comm'n, supra; Cromwell v. County of Sac, supra.*" (308 U.S. at 378)

Similarly, in *United States v. California & Ore. Land Co.*, 192 U.S. 355 (1904), the United States in a prior proceeding had prayed that patents to certain lands claimed by the

[2943]

Land Company be declared void as forfeited. The // final decree had found the patents valid and sustained the title of the Land Company. In the later proceeding the United States filed a second bill seeking to have the same patents declared void on the ground that the land had been set aside as an Indian reservation. In rejecting the Government claim the Court said:

> "* * * Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee.
>
> "* * * the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim, * * * and, *a fortiori,* he cannot divide the grounds of recovery." (192 U.S. at 358)

In *Baltimore S. S. Co. v. Phillips,* 274 U.S. 316 (1927), Phillips first filed a libel in admiralty to recover damages for negligence in failing to provide a safe place to work. After he lost that suit he brought a second action alleging negligence in the trial and operation of the vessel. The Supreme Court held that he was barred under the doctrine of *res judicata:*

> "The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury." (274 U.S. at 322)

If there were any merit to PG&E's present contention, it was its plain duty to present it first to the Court of Appeals and then to the Supreme Court either during the original argument or on motion for reargument, before the Court's mandate issued. Nothing is more clearly settled than that after the Supreme Court issues its mandate no contention or issue which might require a change in any part of the Supreme Court's original decision may be raised either be-

fore a lower court or before this Commission. *Briggs v. Pennsylvania R.R.,* 334 U.S. 304 (1948); *Kansas City So. Ry. v. Trust Co.,* 281 U.S. 1 (1930); *In re Potts,* 166 U.S. 263 (1897); see also *F. P. C. v. Pacific Power & Light Co.,* 307 U. S. 156, 160 (1939).

As the Court said in the *Potts* case, *supra,* where, on remand, a Circuit Court had granted a rehearing on "newly discovered evidence":

> "* * * 'When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case * * *. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded.'" (166 U.S. at 265)

[2945]

Thus it is quite clear that having unsuccessfully argued on one theory that it could increase the contract rate unilaterally, PG&E cannot now come in and attempt to assert the identical right under another theory. But in any event, it is equally clear that the new theory is inadmissible as a matter of law, and that PG&E is entirely in error when it asserts that this issue was not presented to or passed on by the Courts.

[2946]

B.

As PG&E correctly argued before the Commission, the explicit language of the contract cannot be varied by parol evidence.

PG&E's new "basic contention" is inadmissible because it is no more than an attempt to vary the plain language of the contract by parol evidence. It offers to prove that the parties either "believed", "understood" or "had a side agreement" that the provision of the contract that "for all electric energy delivered hereunder, Sierra will pay Pacific in accordance with the following schedule of rates * * *" really meant that the rate could be changed at any time by PG&E. The answer to this attempt was expressly and correctly presented by PG&E itself before the Commission in its opening brief on the prior hearings, at page 21:

> "1. The agreement of the parties is to be determined from the service contract itself.
>
> As the foregoing outline indicates, the present service contract was the fruit of a long period of discussion and negotiation involving consideration and balancing of a number of factors by each of the contracting parties. The resulting service contract was clearly intended to constitute a final expression of the terms of their
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> [2947]
>
> agreement. // It is familiar law that 'If the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same matter are excluded from consideration whether they were oral or written.' 3 Williston on Contracts, Rev. Ed. 1817 (Sec. 632). Although this principle is commonly given effect under the label of the parole evidence rule, it is recognized that it is a

> rule of substantive law 'because it deals with the question where and in what sources and materials are to be found the terms of a jural act.' 9 Wigmore on Evidence, 3rd Ed. 77 (Sec. 2425)."

The applicable principle of law could not have been more correctly stated. It follows that the plain language of the contract here in issue cannot be varied by any evidence of prior agreements as to its "meaning", whether oral or written. It means exactly what it says, and PG&E's president cannot be heard to testify as to any alleged prior oral agreement that it would be "understood" to have a different meaning. PG&E's offer to call him for that purpose should be summarily rejected. Nor can any evidence as to the circumstances surrounding the negotiation of the contract in any way affect its meaning.

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C.

PG&E's assertion that its new "basic contention" and the evidence in its support was not presented to or passed on by the Courts is false. That contention was fully presented to the Courts and decided adversely to PG&E in every respect.

It is true that despite PG&E's correct statement that as a matter of law the contract could not be varied by parol evidence, pages 16 through 40 and 5 through 25 of PG&E's opening and reply briefs on the prior hearings which are now cited in support of its "basic contention" contain extensive discussions of the evidence relating to the negotiations between the parties prior to the execution of the contract, and are replete with such assertions as that this evidence shows that the "understanding of the parties" was "that the contract which was executed was intended to be subject to change whenever this Commission finds such change to be just and reasonable" (PG&E Op. Br. FPC, p. 33). This discussion of the evidence concludes with the assertion, at the end of PG&E's reply brief before the Commission, at page 25, that:

> "In a few words, neither Sierra nor public opinion were demanding a fixed rate, nothing in the situation
>
> [2949]
>
> required a fixed rate and nothing in the // negotiations, the contract, or the explanations of the contract in the 1948 proceeding ever suggested that a fixed rate had been discussed, *much less agreed upon.*" (Emphasis added)

We concede, therefore, that the "basic contention" now tendered by PG&E was presented to the Commission on the prior hearings. But we deny that it was not presented to the Courts and is therefore still "open". On the contrary, it was not only presented to, but was passed upon by the Courts and decided adversely to PG&E's contentions on the basis of the very "evidence" on which PG&E now wishes to reargue the issue before the Commission.

For example, pages 26 (middle) to 35, inclusive, of PG&E's reply brief before the Supreme Court are, with minor editorial changes, exact reprints of pages 9 to 15 and 22 to 25, inclusive, of PG&E's reply brief before the Commission, which PG&E now asserts were presented only to the Commission, and not before the Courts.[8] Moreover, these pages contain substantially the same arguments regarding the circumstances surrounding the negotiation of the contract as those now advanced in PG&E's present Submission at pages 25 through 28.

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[8] True copies of pages 17 through 35 of PG&E's reply brief before the Supreme Court are annexed hereto as Exhibit A.

The burden of PG&E's argument was then, as it is

today, that Sierra's contention that the contract was entered into in order to forestall competition from Shasta Dam is a pure fiction, and that Sierra's assertion that the contract calls for a fixed rate is false. After an elaborate review of the evidence relating to these factual issues, including the identical quotation from the testimony of Sierra's president which it now cites at page 27 of its Submission, PG&E concluded its reply brief before the Supreme Court, at page 35, with the identical paragraph with which it closed its argument before the Commission:

> "In a few words, neither Sierra nor public opinion were demanding a fixed rate, nothing in the situation required a fixed rate and nothing in the negotiations, the contract, or the explanations of the contract in the 1948 proceeding ever suggested that a fixed rate had been discussed, *much less agreed upon.*" (Emphasis added).

Obviously, if the Court had accepted this contention, PG&E would have won the case. For, in that event, PG&E would have had the right under the contract to increase the rate by filing a new schedule, and the Commission's order finding the new schedule not unreasonable would have been valid. But the Supreme Court held exactly the contrary:

> "* * * In 1947 Sierra, faced with increased postwar demands and consumer agitation for cheaper power, began negotiating for power from other sources, including the Federal Bureau of Reclamation, which at the time had unused capacity at Shasta Dam. To forestall

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> the potential compe- // tition, PG&E offered Sierra a 15-year contract for power at a special low rate, which offer Sierra finally accepted in June 1948." (350 U.S. at 351-352)

The Court then held that the contract was binding upon PG&E in accordance with its terms, and concluded:

> "* * * neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra." (350 U.S. at 353)

The major difficulty with PG&E's supplemental motion to reopen is that both the law and the facts on which it is based have been expressly passed on and decided against it by the Supreme Court of the United States.[8a] That decision is final and conclusive.

[8a] It should be noted that the issue as to whether a fixed rate had been "agreed upon" was not raised by PG&E in the prior proceedings as an affirmative "basic contention". On the contrary, as appears from Exhibit A, PG&E advanced this argument as a reply to Sierra's contention that, because of the circumstances under which the contract was negotiated, simple justice and equity required that the Commission should not permit PG&E to increase the rate, regardless of whether or not it had technical legal right to do so. Thus, although it is clear from Exhibit A that this issue, on which PG&E's present "basic contention" is founded, was fully litigated before the Courts, and that the Supreme Court's decision is therefore conclusive, it is also clear that PG&E did not advance this issue in support of its true "basic contention" that the contract rate could be increased unilaterally, as it does now. It follows that PG&E's present "basic contention" is not only founded on an issue which has already been litigated and determined against it; it is also inadmissible. Having unsuccessfully contended before the Courts that it could increase the contract rate unilaterally on one theory, PG&E cannot now be heard to advance the same contention on a new and different theory.

*As corrected by 3069.

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D.

If the issue were admissible, Sierra would present evidence that no such side agreement regarding the meaning of the contract as that alleged by PG&E was ever made.

While it is plain from what has gone before that no testimony as to alleged oral agreements to vary the express provisions of the contract would be admissible, and that, in any event, the issue has been decided by the Supreme Court, Sierra does not wish to leave the Commission with the impression that any such agreement was ever entered into. On the contrary, as appears from the annexed affidavit of Frank A. Tracy, Sierra's President, who conducted the negotiations leading up to the contract, to the best of his knowledge and belief, no such "agreement" was ever made (Exhibit B hereto).

It will also be observed that Mr. Tracy agrees with Mr. Sutherland that after the contract had been entered into, when PG&E was seeking a general rate increase, he told Mr. Sutherland that Sierra could not agree to an increase at that time because of the continuing opposition of the Nevada Public Service Commission and the representatives of Sierra's Nevada customers. However, Mr. Tracy denies that he at any time agreed that PG&E could at a later date

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in- // crease the contract rate unilaterally. We suggest, however, that Mr. Sutherland may now think of this conversation as having taken place before the contract was entered into. It may also be that he assumed from the tenor of that conversation that Sierra would agree to an increase at a later date. If so, he was mistaken.[9]

Sierra would also like to remind the Commission that it is in evidence that at the time PG&E was requesting the approval of the P-31 rate before the California Commission, Mr. B. B. Beckett, PG&E's Chief Rate Engineer, expressly testified for PG&E that one of the purposes of the rate, which was to be offered only to purchasers who entered into contracts for not less than five years, was to give the purchaser the "assurance that he will have service at this lower rate for a period of at least 5 years" (Ex. 10, p. 76). Thus PG&E's statement on page 3 of its present Submission that "in negotiating the contract the parties expressly understood that the rate specified in the contract, although not designated P-31 by name, was in fact that rate and *would be subject to change in accordance with changes in the P-31*

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rate // as filed with the California Commission", is squarely contradicted by the testimony of its own witness.

PG&E also overlooks the fact that before Sierra accepted the 1948 contract its rate engineer, Mr. Devore, compared the rates under that proposed contract with the rates under the contract offered by the Bureau of Reclamation, and found that while in the earlier years there would be considerable discrepancy between the rates, *when extended over the full contract period of fifteen years* it appeared that the rate offered by PG&E was only .55 mills higher than that offered by the Bureau (Tr., pp. 691-698).[10] It was for this reason, taken into consideration with his serious doubt as to whether the Bureau's proposal would be implemented in time to meet Sierra's anticipated peak demands in 1949 and 1950, that Mr. Devore recommended acceptance of PG&E's proposal (Tr., pp. 696-698). Moreover, as appears from the record of the hearings before the California Commission at which the 1948 contract was submitted for approval, it was largely on the basis of Mr. Devore's study and recommendation that the Nevada Commission and the representatives of Nevada's consumers finally withdrew their objections to the contract (Ex. 12, pp. 34-64). As the

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[9] In any event, the letter from the Nevada Commission to this Commission of March 30, 1953 (Ex. 22, 1st letter) shows that, at least as of that date, local opposition had not been dissipated.

[10] As we shall point out at pages 50-51, *infra*, even Mr. Beckett himself computed the rates and costs on the basis of a firm rate for 15 years in his study as to the desirability of offering the P-31 rate to Sierra.

[2955]

Commission is aware, the Nevada // Commission in a letter to this Commission dated March 30, 1953, opposed PG&E's attempt to increase the rate on the ground, among others, that:

> "5—Had there been any doubt of the validity of the contract between the two companies, this Commission would have ordered Sierra Pacific Power Company to construct its own power stations on the Truckee, Carson, and Walker Rivers in Nevada and a steam plant to supplement the hydro power developed on those streams." (Ex. 22, 1st letter)

Thus there can be no doubt that it was clearly understood by Sierra's Nevada customers, as well as by the Nevada Public Utilities Commission, which has primary jurisdiction over Sierra's affairs, that the contract rate was intended to be binding for the term of the contract.

It would seem therefore that if there had been such a secret agreement between Mr. Tracy and Mr. Sutherland as PG&E now alleges, such an agreement would have been unenforcible, even if it were not nullified by the parol evidence rule, because it would clearly have been against the public interest: Its sole effect, and presumably, therefore, its sole purpose, would have been to deceive the Public Utilities Commission of the State of Nevada, the representatives of the Nevada consumers, and the California Commission itself, which approved the contract only after the opposition of the Nevada interests had been withdrawn (Ex. 13, p. 5).

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II.

PG&E's Submission Not Only Fails to Show in What Particulars the Contract Rate Adversely Affects the Public Interest, But Affirmatively Shows That It Does Not.

In its order of September 7, 1956, the Commission directed PG&E, if it should make an additional filing, to

> "show in what particulars, if any, the aforementioned 1948 contractual rates and charges were prior to, on or after June 17, 1954, or presently are so low, after giving proper effect to any benefits accruing to PG&E through the retention of its Sierra business, as to adversely affect the public interest by impairing its financial ability to continue service as a public utility, by casting an excessive burden upon any other of its electric utility customers, by being unduly discriminatory with respect to any other of its electric utility customers, or in any way being adverse to the public interest within the meaning of the aforementioned opinion of the Supreme Court."

As pointed out at pages 14 to 20 of our answer, both the existing record and PG&E's own published statements conclusively demonstrate that its financial ability to continue its service is not only unimpaired, but could hardly be sounder; that not one penny of the "deficiency" under this contract is or can be passed on to its other consumers; and that, as its other consumers do not bear any burden or

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suffer any other disadvantage as a result of the // low contract rate, there is and can be no discrimination with respect to them. PG&E's Submission not only fails to advance a single word to rebut the foregoing demonstration, it does not even mention either the facts or arguments upon which those conclusions are based. All PG&E's Submission shows is that the contract is unprofitable—or rather, that PG&E would make more money if it sold the same power elsewhere at a 5½% return. That is not only obvious, it is immaterial. For as the Supreme Court expressly pointed out:

> "* * * the purpose of the power given the Commission by § 206 (a) [to set aside a contract rate] is the protection of the public interest, as distinguished from the private interests of the utilities * * * [A] contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility." (350 U.S. at 355)

PG&E's Submission is involved and somewhat confusing. At first it asserts that the test as to whether the contract is against the public interest is whether or not the contract rate compensates PG&E for its "avoidable" or "out-of-pocket costs", and attempts to show that these costs exceed its revenues under the contract by over half of million dollars a year. To this contention there are two complete answers: (A), as a matter of law, it is immaterial whether the "avoidable" or "out-of-pocket costs" exceed the revenues unless it is also shown that the resulting loss of revenue

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adversely affects the public interest in the // particulars specified by the Supreme Court and (B), in any event, it is demonstrable from PG&E's Submission itself that its out-of-pocket costs do not exceed the revenues under the contract. For the Submission includes as an "out-of-pocket cost" a 5.5% return on its production facilities, plus the income taxes thereon, and depreciation (Sub., Appendix C, Schedule 1, Sheet 3). If these items are eliminated, it will be seen that the revenues under the contract exceed the true "out-of-pocket costs", even on the basis advanced by PG&E, by more than $10,000,000.

Secondly, PG&E advances an involved and abstruse argument to the effect that a deficiency in rate of return, if substantial, must by a process of "slow and insidious attrition", increase PG&E's "cost of money" which will "ultimately" cast a burden on PG&E's other customers. But PG&E fails to show either that such an increase in cost of money has occurred to date, or how any burden would be cast upon PG&E's other consumers even if such costs should increase in the foreseeable future. For not once in its entire Submission does PG&E come to grips with the fact, affirmatively established by this record and recognized by this Commission in the very order which PG&E is attempting to "revalidate", as well as by the Courts, that under the practices both of the California Commission[11] and

of // this Commission, no burden resulting from any deficiency in revenue under this contract will be permitted to be cast upon its other customers.[12] That, of course, is the conclusive answer to PG&E's entire contention, and its complete silence with respect to it shows that PG&E is unable to meet that answer.[13]

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[11] Re-affirmed by the California Commission as recently as last February 14, as appears from its Decision No. 52642, pages 6-7, annexed as Exhibit B to our supplemental answer.

[12] F.P.C. Opinion No. 270, mimeo pp. 23-24; *Sierra Pacific Power Co. v. Federal Power Comm'n.*, 223 F.2d 605, 606 (D.C. Cir. 1955); *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, 354 (1956).

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A.

As a matter of law, PG&E's contention that its "avoidable" or "out-of-pocket" costs of service to Sierra exceed the revenue under the contract is immaterial.

PG&E goes to great lengths in an effort to demonstrate that during the life of the contract, what PG&E describes as the "avoidable or out-of-pocket costs" which it would save if it abandoned its service to Sierra exceed the revenues under the contract for the same period by approximately $550,000 a year, or a total of over $11,000,000. PG&E further seems to argue that this fact alone renders the contract "against the public interest".[14] This, of course, is erroneous as a matter of law. For it is perfectly obvious that even if PG&E's assertions as to its "out-of-pocket costs" were correct, it does not follow that these "losses" adversely affect the public interest unless PG&E can also show that

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such losses impair PG&E's // financial ability to continue its service, cast upon other consumers an excessive burden, or cause undue discrimination in respect to other consumers. And, of course, PG&E cannot show that, and does not even try to.

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[13] It is also worthy of note that PG&E's Submission does not even attempt to rebut the demonstration contained in Sierra's answer, pages 17-18a, that it affirmatively appears on PG&E's own published financial statements, as a simple matter of accounting, that any deficiency under this contract will be borne exclusively by PG&E's stockholders.

[14] In its original reply dated September 5, 1956, PG&E asserted that it could show "an annual out-of-pocket loss of $800,000" (p. 9), and, no doubt, by applying still different cost figures, it probably could. But then it would have "proved", according to its own standard, that its Supplement No. 1 to its Rate Schedule FPC No. 3, which it now asserts is legal, is also against the public interest.

Indeed, in its opening brief before the Commission, at page 30, PG&E expressly pointed out that even when the "out-of-pocket costs" exceed the revenues, the stockholders are required to bear the burden:

> "* * * Of course, if PG&E had agreed that its stockholders would bear the loss, the rate payers would never be involved unless, perhaps, the Company were on the verge of bankruptcy and its service might be impaired.
>
> "* * * Where a competitive situation actually exists, the lower rate is offered for the benefit of the business as a whole and the stockholder does not expect any reduction in return over the long run. * * * It is when the revenues fall below the out-of-pocket costs that the stockholder is required to bear the burden, presumably as a penalty for bad judgment on the part of management in retaining the business."

That, of course, is our basic contention here. The Supreme Court having expressly held that the present contract was negotiated under a competitive situation, PG&E's argument, which could not be more correctly expressed, would seem to us to be conclusive on this issue, and indeed, on this entire controversy.

PG&E now seeks to bolster its contention that such "losses" render the contract "adverse to the public interest"

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by asserting that in its opening brief before the Commission Sierra conceded that:

> "It is in the public interest that the present contract be maintained in full force and effect, at least as long

> as Pacific earns more under the contract rate than it would save if Sierra's business were lost or abandoned."

But an examination of the text of Sierra's brief immediately following this statement will show that Sierra raised this contention, not as a matter of law, but in support of its alternative contention that *"Quite apart from any legal considerations,* * * * it is in the public interest that the present contract should not be modified or abrogated at this time" (Sierra Op. Br. before FPC, p. 63. Emphasis added).

Moreover, an examination of Sierra's brief will show also that it advanced this argument on the basis of the assertion of Mr. Beckett, PG&E's own Chief Rate Engineer, before the California Public Utilities Commission (then the Railroad Commission) that it was to PG&E's business advantage to offer the low P-31 rate in order to hold a particular business against a threat of competition, provided "* * * the incremental revenue is more than the incremental cost" (Ex. 10, p. 71), or, putting it another way, "* * * if the result does not produce such a low revenue and low rate that it would not meet the costs which might be eliminated if the business were lost" (Ex. 10, pp. 64-65).

On the basis of this testimony, Sierra argued that, inasmuch as it was conceded at the time of the earlier hearings that the contract rate produced a return of 2.6% on an allocated cost of service basis, the standards laid down by Mr. Beckett as determinative of the business advantage of a low-rate contract were still met by the contract rate, and that therefore it was in the public interest that the contract be left undisturbed regardless of the binding nature of the contract as a matter of law. We submit that that was a sound proposition then, and that it is a sound proposition now. For PG&E concedes that, when calculated on an allocated cost of service basis, the revenue under the contract still produces a return.[15]

But it is no longer necessary for Sierra to rely on this proposition, for the Supreme Court has now sustained Sierra's basic contention that as a matter of law, the contract rate is binding until and unless it is shown that the contract rate is "so low as to adversely affect the public

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interest" (350 U.S. at 355). Of course, it requires very different evidence to show that the contract rate is so low as to be against the public interest, than would be required to show that it was in the public interest to uphold the contract rate even though it was not legally binding. For, as the Supreme Court expressly held, in the former situation, it is necessary to show that the rate is so low as to impair PG&E's financial ability, cast an excessive burden on other consumers, or result in undue discrimination with respect to them. Proof of an "out-of-pocket loss" merely proves that the contract is "unprofitable", which is immaterial.[16]

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[15] We should like to point out that it is not at all clear from PG&E's Submission, Schedule 4, whether its calculation of a rate of return of .15% at the contract rate is computed on the basis utilized by PG&E in its original Exhibit 4 in the record herein, or in accordance with this Commission's method of computing the rate of return, as shown on Exhibit 19. We suggest that if it were necessary or appropriate to compute PG&E's rate of return, it would be shown that, on the latter basis, it was far higher than .15%.

[16] We recognize, of course, that if the management of a utility should propose to enter into contracts for a substantial volume of power at rates which clearly would not meet the utility's true out-of-pocket costs, a Commission should take such steps as the law may

B.

As a matter of fact, PG&E's own exhibit shows that the "out-of-pocket cost" of its service to Sierra is not more, but substantially less than the revenue.

In any event, PG&E's elaborate attempts to show that the "avoidable or out-of-pocket costs" of serving Sierra exceed the revenue, are demonstrably preposterous. PG&E's Submission itself, when analyzed, establishes exactly the reverse.

PG&E's contention is based upon Schedule 1 of Appendix C annexed to its Submission. It will be observed that Schedule 1 includes as "out-of-pocket" costs a 5½% return on PG&E's investment in its newest steam plants, plus income taxes thereon, as well as depreciation. Obviously, none of these items constitutes an "out-of-pocket cost". All that PG&E's elaborate argument shows is that if it could abandon its service to Sierra and sell the same electric energy to other customers at a rate producing a 5½% return,

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permit to prevent the utility's entering into such contracts. The Commission will note that the California Public Utilities Commission, which under the state statute must give its consent to any new intrastate rate agreement, insists upon a showing, before a special low-rate contract will be approved, that the contract rate will at least meet the company's "out-of-pocket" costs (Ex. 18, pp. 14-15). But this does not mean that when a utility has entered into such a contract for a valuable consideration, such as to meet competition, and has assured the Commission that the rate was intended and expected to exceed the out-of-pocket costs, the utility can subsequently be relieved of its contract after it has received all the consideration to which it is entitled, simply by showing that it has made an error of judgment and that the contract rate no longer covers its out-of-pocket costs. In such a situation, under the Supreme Court's decision, it is necessary to show that the resulting loss is in fact injurious to the public interest.

(computed on a rate base inflated by the inclusion only of its most expensive modern steam plants), it would make a lot more money. That is obvious, and is exactly what the

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Supreme // Court held was immaterial.

We annex hereto as Exhibit C a copy of PG&E's Schedule 1, revised so as to eliminate these three items. This exhibit shows that there would be a substantial return to PG&E under the contract rate aggregating $10,599,317 over the life of the contract. As Exhibit D, we annex also a copy of PG&E's Schedule 1, revised so as to eliminate only the 5½% return and the income tax thereon, leaving the item for depreciation in the schedule. Thus this schedule contains all of the elements of "cost" which would be included in calculating the incremental return in dollars and cents which PG&E receives from its service to Sierra under the contract on the basis assumed by PG&E in its Schedule 1. It will be observed that this schedule shows that over the period of the contract PG&E would receive for "return" and related income taxes a total of $7,043,317 under the contract rate. Thus it is demonstrable, on PG&E's own showing, that service to Sierra under the contract is not operated at an "out-of-pocket loss", but at a substantial profit.

Of course, we do not agree that the cost of PG&E's most recent, and therefore most expensive, steam plants, has a proper place in computing the incremental "cost" of PG&E's service to Sierra. A more realistic method is that utilized by Mr. Beckett in justifying the low rate under PG&E's con-

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tract // with the City of Redding. When asked whether the incremental revenue would exceed the incremental cost, he answered in the affirmative, pointing to the low incremental cost of serving Redding from PG&E's own adjacent sources of power (Ex. 10, pp. 64-67). Using the same method here, the incremental cost of PG&E's service to Sierra should be computed on the basis of service from PG&E's plants at Drum and Spaulding, which, of course, are among its oldest and most inexpensive. If a rate base derived from the cost of these plants were substituted in the foregoing schedules in place of the cost of PG&E's modern steam plants, it is obvious that PG&E's profit would be substantially greater than $7,043,317.

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C.

PG&E does not show that its cost of money is now or ever will be increased as a result of the contract, and in any event, it is plain that if such costs did increase, such increase would be borne exclusively by PG&E's stockholders.

Evidently recognizing that, under the rate-making practices followed by this Commission and the California Public Utilities Commission, any direct deficiency in revenue under the existing contract will be borne exclusively by PG&E's stockholders and not by its other customers, PG&E attempts to argue that, by a process of "slow and insidious attrition" (Sub., p. 36), the "loss" of return under the contract rate might ultimately place an indirect burden on its other customers in the future because, if it should become sufficiently substantial, it might increase PG&E's cost of money. But PG&E fails to show how, even if its cost of money should increase as a result of this contract, that increase would in any way be reflected in an increase in the rates payable by PG&E's other customers. We submit that it is perfectly apparent that as long as the California Commission and this Commission adhere to their present practices and fix the

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rates of PG&E's other customers on the // basis of an average allocated cost of service in such a manner as to cast the burden of any such contract on PG&E's stockholders, it is just as impossible that the burden of any increase in the cost of money resulting from this contract should be thrown on PG&E's other customers as that its direct deficiency in revenues under the contract itself would be borne by them. For after all, unless the Commissions reverse their established procedures and increase the rates to other consumers in order to compensate PG&E for the burden of this contract, the only effect of an increase in the cost of money would be to decrease the return to PG&E's stockholders. For example, if because of an increase in PG&E's cost of money due to this contract, it is forced to offer a higher interest rate on its bonds in order to sell them, the amount of dollars necessary to meet this increased interest rate is merely deducted from the amount of dollars in PG&E's "return" available to pay dividends on the common stock. Similarly, if the market value of PG&E's common stock is depressed because of a low return, it simply means that more stock must be issued to raise a given sum of money. Here again, unless the Commissions reverse their present practices and increase the rates to other consumers, any "burden" is necessarily borne solely by the stockholders.

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Concedely, if PG&E's cost of money became so high // as actually to impair PG&E's ability to raise the amount of money necessary from year to year in order to expand its facilities so as to meet increasing demands, it would be the duty of the two Commissions, and in the public interest, to take steps to enable PG&E to earn a sufficient return to correct this situation. And if it appeared that this high cost of money was due to the existence of this contract, or of a group of similar low-rate contracts, it would be the duty of the Commissions to set aside all such contracts and fix higher rates to the contract customers. Certainly, it would be improper for the Commissions to increase the rates of PG&E's other customers to offset losses from the contracts. But PG&E does not even contend that any such situation exists now. Nor does it suggest that any such situation could exist in the foreseeable future.

Moreover, it is indisputable from its own published financial statements annexed to Sierra's answer and on file with this Commission that PG&E's financial position is so sound as to enable it to absorb the deficiencies from a number of such contracts without impairing its financial ability to carry out its utility functions. Thus there is no justification for a general rate increase in order to meet the burden of this contract, and in the absence of such an increase, that burden is necessarily borne by the stockholders. As PG&E

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itself points // out, "the mechanism" which would give rise to an increase in the cost of money is obvious. "A significant element in the evaluation of bond yield requirements is the ratio between bond interest requirements and revenues available to pay such interest after operating expenses are met" (Sub., p. 41). An examination of PG&E's Summary of Earnings at page six of its Prospectus annexed to our answer will disclose that PG&E's gross income after taxes exceeds the amount necessary to pay bond interest by more than four times. PG&E's annual gross income after taxes is about $95,000,000. It requires no argument nor the testimony of experts, to dispose of a contention that in this situation added revenues of about $500,000 a year would produce a lower cost of money. Moreover, a glance at market quotations will show that PG&E's bonds presently sell at a rate as favorable as those, for example, of Consolidated Edison Co. of New York, Northern States Power Company, Southern California Edison Company, and many other similar and concededly prosperous companies.

It would appear from pages 39 through 41 of the Submission that PG&E concedes that, in relation to its over-all financial position, its alleged "losses" under this contract are infinitesimal. But PG&E tries to argue that the fact that

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no financial injury is actually // suffered under this particular contract is immaterial, because the Commission must look at every "straw which may contribute materially to such a result" (Sub., p. 38). On this theory, *any* unprofitable contract is a "straw", and therefore illegal. But the Supreme Court has held otherwise.

This is really the same argument that was advanced by Commission Staff Counsel on the prior hearings when he argued that "the fact that only a very small percentage of its business is involved [in this contract] would not seem to alter the principle"[17] that a large number of such contracts might impair PG&E's financial position. But as counsel for Sierra pointed out in his brief before the Supreme Court in answer to this contention:

> "This is not a question of 'principle' but 'fact'. If this contract does not threaten PG&E's financial stability, as concededly it does not, it does not injuriously affect

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[17] Staff Op. Br. before FPC, p. 34.

> the public interest. If it did, or if PG&E had entered into so many that they would, they would all be set aside under 206(a) upon a finding that such were the facts." (Sierra Br. before S. Ct., p. 45, n. 12)

And that is the view adopted by the Supreme Court: "* * * it is clear that a contract may not be said to be either 'un-

just' or 'unreasonable' simply because it is unprofitable // to the public utility" (350 U.S. at 355). It is only if it is shown that a utility's financial position is or in the foreseeable future might be adversely affected by the contract or contracts that it has actually entered into that they can be set aside. Nor is it necessary for the Commission to wait until a utility is "on the verge of bankruptcy" before it can take action. Obviously, any real danger to a utility company's financial position caused by low-rate contracts can be foreseen and corrected long before any harm can actually occur. And clearly, no such danger exists here.

We submit that we have incontrovertibly demonstrated in our original answer and in the exhibit annexed thereto that PG&E's financial condition is not impaired by the present contract and that there is not the slightest evidence that it ever can be impaired by it and that it is equally incontrovertibly established that not one cent of the burden from the low rate will be cast upon PG&E's other consumers. PG&E's excursion into the complex field of "cost of money" may cause confusion, but it adds nothing to its contentions.

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D.

The contract rate is not unduly discriminatory with respect to any of PG&E's other utility customers.

On the question of undue discrimination with respect to PG&E's other utility customers, we agree with Commission Staff Counsel's statement in his argument before this Commission that as long as PG&E's other customers are paying only a reasonable return on the business to them they are "not the victims of an undue discrimination because they're getting all that the law entitles them to in any event" (Tr., p. 1447). We are also in agreement with the Commission's finding, based on the same principle, that a difference in costs between service to Sierra and to California-Oregon Power Company [COPCO], would not cause any undue discrimination or preference:

> "10. * * * Inasmuch as it does not appear that the rate to California-Oregon exceeds the cost of service to it, or that the ultimate consumers connected therewith are placed at a competitive disadvanage as compared to ultimate consumers connected with this sale to Sierra, this cost differential does not, of itself, appear to make the proposed rate unduly discriminatory or preferential." (FPC Opinion No. 270, mimeo p. 28)

PG&E suggests that because the differential is substantially greater under the contract than that considered by the Commission in its Opinion No. 270, the present rate must

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be "unduly discriminatory". But that is a *non sequitur*. It is still true that COPCO's rate does not exceed the cost of serving it, and that its ultimate consumers are not placed at a competitive disadvantage as compared to Sierra's ultimate consumers.[18] Accordingly, the same principle still applies.

In considering the question of discrimination between wholesales of electric energy to distributing companies for resale, it must be borne in mind that while uniformity may be desirable it is not always attainable. Differences in rates in this field stand on a totally different footing, for example, than differences in rates to adjacent or competing consumers. There, any difference is on its face either discriminatory or preferential. Any "special contract" would therefore be, at least prima facie, against the public interest.

But as the Supreme Court pointed out, when we are dealing with sales at wholesale to distributing companies, special contracts are expressly recognized by the Act, and are frequently necessary. This is so for a number of reasons. For example, it is not only in the public interest, but the duty of a distributing company to obtain the cheapest available power for distribution to its consumers. If, owing to its location, or the fortuitous circumstance that competing producers are bidding for its business, a distributing company is in a position to purchase its power requirements at a low

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rate, it is clearly its duty (and in the public interest) to take advantage of that situation for the benefit of its consumers. And that, as the Supreme Court has expressly held, is exactly what Sierra did when it refused PG&E's offer of a contract at a higher rate and forced it to offer the P-31 rate "to forestall the potential competition" from the Bureau of Reclamation (348 U.S. at 352). The fact that the rate may be lower than that available to other distributing companies which are less fortuitously situated certainly does not make it "unduly discriminatory".

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[18] As will be seen from the map annexed hereto as Exhibit E, the service areas of the two companies are separated by over a hundred miles, mostly desert.

The resulting rate here is no more discriminatory as against COPCO than the even lower rate at which PG&E serves the City of Redding, or the rate at which Sacramento purchases power from the Bureau of Reclamation—or for that matter, the rate under the contract offered to Sierra by the Bureau would have been, if it had been acceptable. Surely, no one would contend that if Sierra had accepted the Bureau's proposal and were now obtaining power at a rate substantially lower even than the contract rate, or if PG&E had agreed to wheel power to the Summit for the Bureau's account, either contract with the Bureau could have been set aside as "unduly discriminatory" with respect to COPCO or any of PG&E's customers which had not had the opportunity of entering into a similar arrangement. How then can it be said that this contract, entered into, as the Supreme Court has held, in order to forestall that "po-

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tential // competition", is any more so?

In any event, we do not see what standing PG&E would have to complain of its contract, even if it were discriminatory. If there were any harmful discrimination as against COPCO, COPCO itself would have the right to institute a proceeding before this Commission to review the contract under § 206(a). So also, if there were any discrimination as against any of PG&E's other consumers in the State of California, either the consumers themselves or the California Commission would have the right to institute a proceeding before this Commission. But the California Commission has refused to permit PG&E to increase its contract rate to Sierra (Ex. 17, pp. 40-42), and there is no evidence, and PG&E does not even allege, that COPCO or anyone else (except PG&E itself) has any objection to Sierra's contract.

We submit that it is clear that the contract rate is neither "unduly discriminatory with respect to any other of PG&E's electric utility customers", nor in any other manner "adverse to the public interest".

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III.

PG&E's Contention That It Received "No Offsetting Benefits" from the Contract Is Nonsense: PG&E Got Exactly What It Bargained For, and Now Asks the Commission to Relieve It from Its Obligation to Pay the Price.

PG&E devotes some ten pages of its Submission to its contention that it received no "offsetting benefits" from the contract because it is unprofitable. Accordingly, it now asserts, PG&E would be better off if it had never entered into it. As we have seen above, it is immaterial that the contract is unprofitable. But in any event, it is clear from the record that PG&E considered at length and in detail the relative advantages to it of offering the P-31 rate, agreeing to wheel Shasta power to PG&E for the Bureau, or abandoning Sierra's business altogether, and concluded that it was to its business advantage to offer a fifteen year contract at the P-31 rate in order to hold the business and forestall the competition from the Bureau. All it is really seeking now is that, having received all the benefits of that agreement, the Commission should help it renege on its obligation to pay the price.

PG&E's perennial assertions that Sierra's contention that the contract was entered into in order to forestall competition "is a figment of Sierra's imagination" and "fictitious" and that it is "false" to say that the parties agreed that the rate would be fixed (Sub., pp. 26-27), have a hollow ring in the light of the decision of the Supreme Court that, "To forestall the potential competition" from Shasta Dam, "PG&E offered Sierra a 15-year contract for power at a special low rate", and attempted to increase the rate "when power from Shasta Dam was no longer available to Sierra * * *" (350 U.S. at 352). Thus, in reality, PG&E is now hurling its epithets at the Supreme Court of the United States itself.

Moreover, as we have pointed out heretofore,[19] the Court's decision as to the facts was reached after PG&E had argued at length in support of its assertion that the evidence showed that the contract was not offered to forestall competition, that PG&E did not seek to increase the rate as soon as Shasta power became unavailable to Sierra, and that the contract was not intended to provide for a fixed rate.

As will be observed from PG&E's reply briefs,[20] PG&E presented this argument, both before the Commission and before the Courts, in reply to Sierra's contention that, be-

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cause of // the circumstances under which the contract was negotiated, simple justice and equity required that the Commission should not permit PG&E to increase the rate, regardless of whether or not it had a technical legal right to do so.

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[19] Pages 18-21 *supra*.

[20] The pertinent pages containing PG&E's argument in the Supreme Court are annexed hereto as Exhibit A.

Sierra's contention is set forth in pages 50 to 65 of its brief before the Supreme Court, copies of which have been served on the Commission. As will be seen from an examination of those pages, Sierra based its argument both on the prior testimony of PG&E's own witnesses before the California Commission, and on the studies made by PG&E's Chief Rate Engineer, Mr. Beckett, and Mr. N. S. Sutherland, then its Vice President in charge of sales, in October, 1947.[21] These studies were made at the request of PG&E's former president, Mr. Black, after Sierra had rejected PG&E's offer of a contract calling for a higher rate plus an escalator clause (Ex. 27, p. 4; Ex. 44, p. 1). As we pointed out in our brief before the Supreme Court, the resulting studies show that both Mr. Sutherland and Mr. Beckett considered in detail the probable cost to PG&E, the cost to the Bureau, and the resulting cost of power to Sierra, when projected over the full term of the contract, under two proposals advanced by the Bureau, that PG&E wheel Shasta power to the Summit (Ex. 43), or that it construct a new line over the mountains into Nevada (Tr., pp. 682-687), and compared

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the result with the // costs if PG&E should offer to serve Sierra at the P-31 rate. Both studies show that the Bureau's proposal to construct new lines across the mountains would produce a lower average cost to Sierra than P-31. The studies also show that the cost to Sierra under the Bureau's wheeling proposal would be substantially the same as its cost at the P-31 rate, and that PG&E could make a substantial profit if, instead of wheeling for the Bureau's account, it purchased Shasta power from the Bureau, transported it to the Summit, and there sold it at the P-31 rate: "It is a toss up between P-31 and C. V. [Central Valley or Bureau rate] + costs to Summit. The exchange basis plus charges is no better than P-31" (Ex. 45, p. 7). Mr. Sutherland also points out that if PG&E should agree to the Bureau's wheeling proposal "we would be in endless trouble to do the same thing for others" (Ex. 45, p. 2). Accordingly, the P-31 rate was offered, and accepted by Sierra.

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[21] Exhibits 44 and 45.

In its reply brief in the Supreme Court, PG&E attempted to belittle this evidence, and argued that there was no competition at all (see Ex. A). But the courts drew precisely the conclusions from this evidence which we have advanced from the outset, and rejected every conclusion advanced by PG&E. Thus, the Court of Appeals, which went into the facts in slightly more detail than the Supreme Court, found the facts to be as follows:

> "In 1938, Pacific Gas and Electric Company * * *
>
> [2982]
>
> entered into its second 15-year contract to // sell electric energy to Sierra Pacific Power Company * * *. With the end of World War II, it became apparent that before expiration of this contract in 1953 Sierra's rapidly increasing demands would require either the construction of an additional transmission line into its area by PG&E, or the development of a new source of power. Accordingly, in 1947 Sierra commenced negotiations with PG&E and the Bureau of Reclamation which offered to furnish power from Shasta Dam.
>
> At first PG&E offered a 15-year contract at the 1938 contract rates but with an 'escalator fuel clause.' Sierra rejected this and turned to intensive negotiations with governmental agencies for 'cheap Government power.' P G & E then proposed a lower rate (the so-called P-31

> schedule) for the same term without the escalator clause. This proposal was accepted in June 1948 and embodied in a contract which was duly filed with the California Public Service Commission and the Federal Power Commission. The P-31 schedule was a lower rate approved by the California Public Service Commission (formerly Railroad Commission) to enable P G & E to retain business of customers that would otherwise 'be lost altogether' to public power competition. But a significant condition of this approval was that any loss from such service would be borne by P G & E's stockholders and not by its other customers.
>
> In 1952, however, when public power from Shasta Dam was no longer available to Sierra, P G & E sought the California Commission's approval for rate increases for Sierra and other customers under the P-31 schedule.[2] (Fn. 2: With the significant exception of one city [Redding] which still could have utilized Shasta Dam power.) The Commission refused on the ground that the special contracts were entered into 'in order to forestall alleged government competition and with the clear understanding that its stockholders must bear any burden * * *.' In February, 1953, in a further effort to increase its rates, P G & E filed the schedule of increased rates in question here with the Federal Power Commission under § 205 * * *." (223 F.2d at 606)

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As we have seen, the Supreme Court's opinion, while going into somewhat less detail, is prescisely to the same effect.

It is somewhat startling to find a member of the Bar of the Supreme Court of the United States now designating Sierra's recital of what the Supreme Court has found the facts to be, as "figments of Sierra's imagination", "false", and "fictitious". But in any event, unfortunately for PG&E's present contentions, the Supreme Court has the last word, and that word has been spoken: PG&E offered Sierra a 15-year contract at the P-31 rate for the purpose of holding Sierra's business against the threat of Bureau competition, and attempted to repudiate the contract when that purpose had been accomplished. It got what it wanted, but doesn't want to pay the price.

It may well be, as PG&E's Submission suggests, that as events have turned out PG&E would have been better off if it had accepted the Bureau's wheeling proposal, or abandoned its service to Sierra altogether.[22] But it should also be borne in mind that if PG&E had entered into the wheeling proposal Sierra would now be obtaining the benefits of the Bureau rate plus PG&E's charges for transmission to the

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Summit. And // if PG&E had refused either to wheel power for the Bureau or to offer the P-31 rate, it is plain from the record that Sierra would have been compelled by the pressure of its own customers, and more particularly of the Public Service Commission of Nevada itself, to accept the Bureau's proposal to build new lines over the mountains (Ex. 12; Ex. 22, 1st letter). In that event, Sierra would now be purchasing all the power needed for its present or foreseeable requirements at an average cost of .55 mills less per K.W.H. than its costs under the 1948 contract (Ex. 12, pp. 36-37).

Of course, if Sierra had been ordered to accept the Bureau's proposal by the Nevada Commission, which has jurisdiction over Sierra's retail sales, it could not have been charged with any violation of its "public utility" obligations as PG&E perennially asserts, even if the anticipated shortages had developed. But, as the record shows, as a matter of fact no such shortages would have developed. Sierra's actual peak demands did not exceed the 40,000 K.W. it could have obtained under its existing facilities (Ex. 12, p. 29) until 1952, with the exception of a minor excess of 560 K.W. in 1950 (Tr., p. 706). Thus, the fears which led Mr. Tracy to reject the Bureau's proposal and accept PG&E's were unfounded.

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[22] PG&E's rate engineer Roberts testified that when the P-31 rate was offered in 1947, PG&E's management were counting on a "recession", and a consequent drop in costs (Tr., p. 1295).

But in any event this issue has been put at rest. For the courts have upheld the basic facts on which Sierra has throughout contended that as a matter of equity and simple

[2985]*

justice PG&E should be held to its part of the bargain, even if it were not compelled to observe it under the decision of the Supreme Court.[22a] Whatever potential loss PG&E may contend that it is now suffering under that bargain is offest by the potential loss Sierra and its consumers would suffer if PG&E were relieved of its obligation under the contract, now that, as the Supreme Court has held, Shasta power is no longer available to it.

[22a] It is idle for PG&E to argue that the Court's statement of facts is not binding on it on this remand. It is plain from Exhibit A that it was PG&E itself which placed these facts in issue before the Courts by controverting the statement of facts advanced by Sierra. The record further conclusively shows that these issues of fact were litigated at length and in detail before the Courts and resolved against PG&E's contentions. Having chosen the Courts as the forum in which to litigate these issues, PG&E is bound by the result, and cannot now attempt to re-litigate the same issues before the Commission on this remand. It is also to be borne in mind that in any event, the remand authorizes only such "further proceedings" as are "not inconsistent with this opinion". As the Supreme Court has pointed out, "The direction to proceed consistently with the opinion of the Court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length." *Gulf Refining Co. v. United States*, 269 U.S. 125, 135 (1925)

*As corrected by 3070.

PG&E having obtained the benefits of the contract, we submit that the public interest, as well as the simplest principles of justice and equity, dictate that it should not be relieved of the burden of paying the price.

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IV.

PG&E Has No Defense to Sierra's Complaint in Docket No. E-6697.

PG&E's attempt to answer Sierra's complaint in Docket No. E-6697 deserves scant attention. Having argued that the Supreme Court has never decided the basic issue invloved in this controversy, that its decision is inapplicable, and that the facts as set forth in its opinion are "figments of the imagination", "false", and "fictitious", PG&E now contends that the Court's decision is ineffective because it has not been implemented by this Commission: PG&E's unilateral filing of "Supplement No. 1 to its Schedule FPC No. 3" is still the legal "filed rate" because it has not been physically expunged from the Commission's records (Sub., p. 55), notwithstanding the Supreme Court's decision that the unilateral filing of a schedule changing a contract rate was "a nullity"[23] and not "effective to change PG&E's contract with Sierra".[24] Similarly, the Commission's Opinion No. 270 is still valid and effective because "The Commission

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[23] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956).

[24] *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

[2987]

has // not amended or rescinded" it (Sub., p. 61), notwithstanding the Supreme Court's decision setting it aside as "invalid".[25] Apparently, PG&E is trying to enlist the Commission as a partner in the flagrant disregard of the Supreme Court's decision which is the pervading theme of PG&E's entire Submission. Has PG&E not read § 313(b) of the Federal Power Act? The judgments and decrees of the courts are "final", and require no implementation from the Commission. The filing having been declared "a nullity" and the Commission's order of June 17, 1954 "invalid", the only rate lawfully on file with the Commission is the contract rate, and it is unlawful for PG&E to charge Sierra with any different rate.

Even conceding that under the doctrine of the *Atlantic* and *Morgan* cases a court of equity might conceivably permit PG&E to retain the sums heretofore collected while the Commission's order was still in force, there is nothing in those cases or elsewhere in the law which authorizes PG&E to continue to charge the higher rate after the Commission's order has been set aside. Nor does the Court's order denying Sierra's motion to amend the opinion support such a proposition. Sierra's motion dealt only with its right to restitution and had nothing to do with PG&E's right

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to continue charging an // unlawful rate, and in any event, it is plain from the language used by the Court (351 U.S. 946) that the motion was denied solely because, as the Solicitor General pointed out in opposing Sierra's motion,

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[25] See *F.P.C. v. Sierra Pacific Power Co.,* 351 U.S. 946 (1956).

Sierra's right to restitution was not properly before the Court.[26]

But it is idle to discuss this question further because PG&E's Submission does not even purport to show that the contract rate is now or has at any time in the past been "adverse to the public interest". PG&E should be ordered forthwith to cease and desist from demanding of Sierra an unlawful rate.

CONCLUSION

The issue before the Commission under the Supreme Court's remand is whether or not it is desirable for the Commission to hold further hearings in order to determine whether or not the contract rate is so low as to be adverse to the public interest.

Under the Commission's order of September 7, 1956, PG&E has had every opportunity to show either by factual material or argument in what particulars, if any, the contract rate is or has been against the public interest, and has wholly failed to do so. We submit further that it affirmatively appears from the record now before the Commission in Docket No. E-6842, including the records of the prior hearings, PG&E's Submission, and Sierra's original and supplemental answers, as well as this reply, that the contract does not, never did, and will not in the foreseeable future adversely affect the public interest. Nor does PG&E's Submission raise any material issues of fact other than such as have already been passed upon and determined in Sierra's favor by the Supreme Court of the United States. For Sierra does not deny the factual accuracy of the documents annexed to PG&E's Submission, nor does PG&E deny the factual accuracy of the documents annexed to Sierra's original and supplemental answers. The only issues raised by PG&E's Submission and by this reply relate to the materiality of and conclusions to be drawn from that factual

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[26] While the Solicitor General was correct in pointing out that the issue of Sierra's right to restitution was not present in the *Sierra* case. that issue was directly raised in the *Mobile* case. For there Mobile had requested that payments under the filed rate increase be held subject to the refunding provisions of § 4(e) of the Natural Gas Act and the Commission had denied the request on the ground that the filing was not subject to suspension. The Courts disposed of this issue by holding that it was not reached because the money had been unlawfully collected, and Mobile was entitled, not to refund, but to "restitution". In *Sierra,* on the other hand, the Commission, having suspended the rate, had issued an order when it became effective, directing that it be collected subject to the refunding provisions of § 205(e) (Order issued Sept. 28, 1953 in Docket No. E-6482), so that no issue as to either "refund" or "restitution" ever was presented in the record on review. Hence, the denial of Sierra's motion "without prejudice", and hence, also, the difference between the Supreme Court's opinions in the two cases, on which PG&E places so much reliance.

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material, and no expert testimony // is necessary for the purpose of resolving those issues. Thus it is clear from the record that no purpose will be served in holding further hearings, and we submit, therefore, that it is not desirable or in the public interest for the Commission to do so.

It is therefore respectfully submitted that the Commission should deny PG&E's motions to reopen and dismiss the proceeding in Docket No. E-6482. It is also respectfully submitted that the Commission should order PG&E to cease and desist from demanding of Sierra a rate in excess of the contract rate, as requested in Sierra's complaint in Docket No. E-6697.

Dated: November 14, 1956.

Respectfully submitted,

WINTHROP, STIMSON, PUTNAM & ROBERTS
By WILLIAM C. CHANLER
William C. Chanler
Attorneys for Sierra Pacific
Power Company
40 Wall Street
New York 5, N. Y.

William C. Chanler
J. Philip Bahn,
Of Counsel.

[2991]

State of New York
County of New York—ss.

WILLIAM C. CHANLER, being duly sworn, deposes and says that he is a member of the firm of Winthrop, Stimson, Putnam & Roberts, attorneys for Sierra Pacific Power Company (the "Company") in Docket Nos. E-6482 and E-6697 before the Federal Power Commission; that he has read the foregoing reply of the Company, as well as the Company's answer and supplemental answer filed June 28 and July 18, 1956 to Pacific Gas and Electric Company's motion for reopening and further hearing in Docket No. E-6482; that he knows the contents of said reply and answers; that all facts alleged therein are true as stated; that said reply and answers have been subscribed and executed by him in the capacity specified therein with full power and authority so to do; and that he, rather than an officer of the Company, has made this verification because of the nature of the facts verified and the present unavailability in New York of an officer of the Company.

WILLIAM C. CHANLER

Subscribed and sworn to
before me this 14th day
of November, 1956.
HAROLD L. CORMANY
Harold L. Cormany
Notary Public, State of New York
Qualified in Westchester County
No. 600764000
Commission Expires March 30, 1957
[Seal]

* * * * * * *

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Exhibit A

The following pages set forth a true copy of PG&E's reply brief before the Supreme Court in *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), starting with point "V" on page 17 of that brief.

[2994]

V. Sierra's Statements of Fact Are Misleading and Erroneous.

Finding that many of its arguments are irrelevant to the issue of reasonableness of the rate Sierra has incorporated a miscellany of items in its statements of fact and in a point which refers vaguely to abuse of administrative discretion.[15]

These contentions are based on statements of fact which are sometimes totally erroneous and sometimes simply misleading. We take up what seem to us the more important errors.

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[15] Respondent's Brief, p. 50.

A. Sierra's Repeated Statement That PG&E Entered Into Contracts Tying Up All of the Bureau's Available Power is Contrary to Fact.[16]

There is no evidence whatever to justify this statement. PG&E agreed, in April 1951, to "wheel" power for the Bureau. PG&E purchases no power under this agreement. In October 1951 PG&E made an agreement to purchase from the Bureau power in excess of that which the Bureau wished to sell to any customer. PG&E obviously tied up nothing by these contracts.

These contracts are not in evidence and there is no competent description of their terms in the record. We are compelled to go outside of the record because of Sierra's unjustified charges, which have no evidentiary support.

[18]

B. Sierra's Statement That PG&E Denied in its Brief before the Court of Appeals That It Entered Into a Wheeling and Purchase Agreement is Contrary to Fact.[17]

This is not at all what we denied. Sierra's reference is to our denial of an entirely different proposition. We actually said:

[2995]

> "Sierra attempts to impute bad faith to PG&E on the ground that it has sought an increased rate because it has made Shasta Dam power unavailable to Sierra.

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[16] Respondent's Brief, pp. 52 and 61.

[17] Respondent's Brief, p. 9, note 6.

> The imputation is false. Although it is true that PG&E purchases all the power from Shasta Dam not otherwise disposed of by the Bureau of Reclamation, it is also true that the Bureau has no continuing obligation to sell such power to PG&E and may sell to any customer it chooses. There is no testimony to the contrary in this record and this Court should be advised that such is the actual fact."[17a]

Out statement is still true. Sierra attempted to answer it by referring to a telephone conversation which showed that the Bureau had made a contract in 1952 to sell 290,000 kilowatts of power to the Sacramento Municipal Utility District. This demonstrated that it was the Bureau which tied up its power, not PG&E.

C. Sierra's Repeated Statement That PG&E First Attempted to Increase the Sierra Rate "After the Threat of Competition Had Been Removed" is Contrary to Fact.[18]

The fact is that PG&E filed its specific proposal for an increase in the Sierra rate in October 1951,[19] some 14 months before December 1952 when the Bureau made the 290,000 kilowatts contract above referred to.

When the events are considered in the order in which they occurred it is clear that PG&E initiated the increase in contract specified rates simply for the purpose of meeting increased costs and that the filing was made after the PG&E

[17a] Brief for Intervenor PG&E in U.S. Court of Appeals for District of Columbia, p. 33.

[18] Respondent's Brief, pp. 9-10; see also pp. 52 and 55.

[19] See *In re Pacific Gas and Electric Co.*, 52 Ops. & Ord. Pub. Util. Comm. of Calif. 113; 96 PUR(NS) 493.

had agreed to provide facilities by which most of the con- [2996] tract customers could // actually obtain power from the Bureau.

D. Sierra Did Not Have Even the Hope of a Proposal to Obtain Bureau Power Through PG&E Wheeling.

One of the two alternatives which Sierra claims to have been responsible for the rate of the 1948 contract is a proposal for "wheeling" Bureau power over PG&E lines to Nevada.

It would indeed be amazing if PG&E should turn out to have been willing to supply the means by which the Bureau [20] of Reclamation could take over the Sierra business. The fact of the matter is that Sierra cannot show that it ever considered it possible that PG&E would wheel Bureau power. Certainly, Sierra's president would have been dishonest if he had thought that wheeling was a competitive possibility and yet testified in 1948 that the reason Bureau power could not be considered was that it would take too long to get a Congressional appropriation and build the required transmission lines. That he was honest in that is borne out by the statement of Sierra's counsel at the same hearing that wheeling was "utterly impossible."[20] In fact, it did not even occur to the present counsel for Sierra to argue the wheeling possibility in his original brief in 1953 to the Federal Power Commission.

To support its charge of self-competition by PG&E,

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[20] R. 242.

counsel for Sierra points to the fact that the Bureau asked PG&E to wheel to Nevada and that PG&E studied the cost and revenue implications of such a proposal. It is abundantly clear, however, that PG&E was not willing to "wheel" to Sierra for the Bureau's benefit. In fact, PG&E maintained the same position when it finally agreed to wheel power for the Bureau in the Central Valley region of California. PG&E could not now be said to have deprived Sierra of an opportunity to obtain power by wheeling when Sierra never had such an opportunity in the first place.

E. The Proposal for Construction of a Power Line Over the Sierra-Nevada Mountains to Supply Sierra with Power from Shasta Dam Could Not Have Met Sierra's Power Requirements.

The proposal of the Bureau to construct a power line was a mere possibility, depending upon obtaining an appropriation from Congress. Admittedly, the line could not now have

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been completed in time to meet Sierra's requirements. Counsel for Sierra attempted to meet this defect in his argument to the Federal Power Commission by asserting that Sierra could have developed additional plants "to tide over the expected shortages until the Bureau's lines could be completed."[21] This statement was made in the face of testimony by Sierra's president that construction of the plants would have taken a minimum of three years.[22] The absurdity of

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[21] Sierra's opening Brief before the Federal Power Commission, p. 66. See also p. 39.

[22] R. 217.

[2998]

making an invest- // ment in generating plants for the purpose of "tiding over" a brief span of years is manifest.

In arguing to this Court, counsel now prefers to assume that Sierra would simply refuse to supply the additional power needed in its area. Although Sierra's rate engineer mentioned such a refusal in his testimony given in 1953, it is plain that no one in 1947 or 1948 proposed or considered such a course, which would constitute failure by Sierra to live up to its public utility obligations.[23] Least of all, do we think that Nevada Public Service Commission would have permitted such a situation to arise, even though in 1953 it said that it might have ordered construction of additional plants in 1948.

Uncertainty as to the obtaining of an appropriation and the certainty of delay were not the only defects in the Bureau's proposal to construct a transmission line. Sierra's president testified that he could not rely upon a single hydroelectric generating source and a single transmission line as a source of supply. He said that standby service from another source would be necessary "to assure anywheres near reasonable service", and that the cost of such

[22]

standby would mean "prohibitive" total cost for the necessary service.[24]

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[23] See Sierra's recognition in 1948 of its obligation to serve. R. 209.

[24] R. 208-209, 213.

F. Sierra Fails to Produce Any Evidence to Contradict the Commission's Conclusion That PG&E Was the Only Feasible Source of Power to Supply Sierra's Requirements.

The Commission states:

> "Second, we find Sierra's argument that it has foregone other sources of supply in reliance upon the continuance of all terms of the 1948 agreement unconvincing in the light of the record which clearly shows that in 1948 Sierra regarded the other sources of supply as being so unacceptable that PG&E became, in fact, the only feasible source."[25]

In all of the seven pages of argument with which Sierra attempts to refute the foregoing statement there is no reference to any evidence whatever which denies that "in 1948 Sierra regarded the other sources of supply as being so unacceptable that PG&E became, in fact, the only feasible source." Sierra has a good deal to say about PG&E's alleged motives, and it has nothing to say about Sierra's motives which would seem to be the actual subject of the proposition. Since the testimony on behalf of Sierra is so unequivocally clear that it did not want Bureau power, even at bargain prices, counsel for Sierra is obliged to brush it aside on the ground that the statements emphasized only part of the facts and in effect were mere self-serving declarations.[26] The fact of the matter is that Sierra's officers knew as well as anybody that they could not get power from the Bureau, either by wheeling or by construction of a

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[25] R. 451.

[26] Respondent's Brief, pp. 58 and 59.

[3000]

power line, in time to meet their needs. Nor, as we // have

[23]

already pointed out, could construction of a plant by Sierra have been completed in time to meet its needs.

G. Sierra's Argument About PG&E Motivation is Plainly Invented.

Sierra's argument is based entirely on the proposition that because PG&E for its own internal purposes made a study of cost and revenue combinations in connection with the Bureau's unaccepted wheeling proposal, the Commission should therefore have disregarded everything else in the record.

It is absurd, of course, to think that the cost of service can be changed by making a different kind of cost study. Only counsel for Sierra would have the imagination to argue as though the cost of service to Sierra depended upon what figures Mr. B. B. Beckett or anybody else wrote down in a cost study.

What counsel for Sierra ignores and should in fairness have advised this Court is that PG&E made a detailed cost study some months previously and developed the amount by which service to Sierra at the rate then proposed by PG&E would fall short of producing a 6% return. This was a cost study based on the actual fact that Sierra was supplied from PG&E's integrated system. Mr. Beckett's study

[3001]

was based on the hypothesis that only Shasta power // was used to supply Sierra, and consequently his study produced a purely hypothetical result. The Commission was therefore quite justified when it said:

> "Furthermore there is no warrant for the Commission to adopt a method of determining cost of serving a particular customer from an integrated electric power supply system which considers only the cost of energy from a single source of power on that system."[27]

[24]

That Sierra would have agreed with the Commission in 1948 is shown by the fact that Sierra's president then testified before the California Public Utilities Commission that his company was relying on the 75 diversified generating plants connected to PG&E's system and not on any single source of power.[28] A witness for PG&E in the same proceeding testified that Shasta power would be part of PG&E's power pool and that some Shasta power would undoubtedly find its way to Sierra but no one could say how much.[29]

Further, it is clear that the hypothetical costs under a wheeling arrangement were not the basis for fixing the rate which was offered Sierra. The rate to Sierra was substantially in excess of those hypothetical costs and would obviously have produced a return materially in excess of the 6% on the capital there assumed.

[3002]

H. Sierra's Attack on the Commission's Conclusion That the Rate of Return Under the New Rate Is No Higher Than the Rate of Return Anticipated Under the Contract Is Entirely Unwarranted.

If the rate of return under the new rate for Sierra does not exceed the rate of return which was anticipated under the old rate it is clear that the increase in rate is equivalent to the increase in costs over those anticipated. The Commission's inquiry to the parties asking what rate of return was foreseen or reasonably foreseeable by PG&E at the time it made the contract was evidently intended to develop whether this equivalance between the increase in the rate and the increase in costs actually existed. Consequently, in endeavoring to answer the Commission's inquiry PG&E referred to the study of actual costs to serve Sierra from its

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[27] R. 455, note 10.

[28] R. 210.

[29] R. 203.

[25]

integrated system.[29a] As we have said, this cost study found the actual cost of serving Sierra on the basis of a 6% rate of return. This cost was compared with revenues under the then proposed rate to find the deficiency in revenue below cost of service. There is no doubt that the amount by which this deficiency would be increased by reason of the reduction in revenue due to proposal of the P-31 rate was a simple matter to determine and was known to PG&E management at the time of the final negotiations. The Commission

[3003]

rightly rejected on the basis of common sense Sierra's attempted inference that Mr. Beckett's hypothetical study was the sole information on which PG&E acted.

In order to show what PG&E's actual cost study meant in terms of rate of return as requested by the Commission, it was a simple matter to relate these cost figures to the appropriate amount of capital. In brief, PG&E not having an "actually foreseen" rate of return presented the cost figures that were actually known so as to show the "reasonably foreseeable" rate of return.

29a. See testimony of Mr. John F. Roberts, R. 67 *et seq.*

Contrast with this the study which Sierra would have this Court believe is the answer to the Commission's question. In the first place, it does not develop a rate of return, and no one can tell from the figures in its study what rate of return was foreseeable under the P-31 rate proposal. We can say with certainty that it must have been more than 6% because the revenue exceeds the cost with return assumed at 6%.

Sierra unsuccessfully tried to persuade the Commission to accept a study which was based upon a purely hypothetical allocation of Shasta power, a study which did not even give an answer to the question which the Commission asked. On the other hand, PG&E's study was based upon actual cost estimates from which it was possible to develop on a

[26]

[3004]

rational basis the reasonably foreseeable rate of // return. The PG&E study, which occupies pages 356 to 408 of the Record, makes clear the source of the figures and the manner in which they were developed. The Commission's acceptance of their soundness was fully justified.

In view of all the argument by Sierra over this matter of cost studies it might be supposed that Sierra thought that the hypothetical wheeling cost study would show that the 1948 contract specified rate was still reasonable in 1952. As a matter of fact, even by this test the Commission showed that the contract specified rate was unreasonable.[30] Sierra fails to comment on this.

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[30] R. 455.

I. The Evidence Actually Shows That It Was Understood That the Purpose of the Term of the Contract Was to Protect PG&E's Investment.

The direct and positive evidence of the contract itself and the virtually contemporaneous statements in the 1948 hearing before the California Commission prove that the purpose of the 15-year term was protection of the new investment in a 100,000 volt transmission line.

Two prior contracts, each of which called for a new transmission line, had 15-year terms. PG&E's first proposal to Sierra in 1947 was for a new line and a new 15-year term. The 15 years was accepted without discussion throughout the negotiations and without relation to the rate.

[3005]

It is significant that the contract relates the // 15-year term to the completion of the new 110,000 volt line and requires a new 15-year term to begin when a second such line is completed and placed in operation to meet Sierra's requirements.

When to this internal evidence of the contract is added the statements of both parties made before the present controversy arose there can be no doubt that the term of the contract was intended to protect their respective investments. As to the reason for the 15-year term, Mr. Pollard testified for PG&E before the California Commission in 1948:

[27]

> "Well, of course, that was—on our part was in order to guarantee that we would have business for a long enough period of time *to warrant us in making the investment* in the cost of the new line and amortizing it. And, furthermore, followed the same pattern as pre-

> vious contracts we have had in each of which instances a substantial investment was made for service of this customer. And, similarly, 15-year contracts were taken at each of those times for that reason."[31]

In the same proceeding Sierra's president testified on the necessity for a 15-year contract as follows:

> "When load conditions are such that you have to have additional capacity it might be that that additional capacity could be arranged to carry you over for a short period—be sufficient to carry you over for a short period, but in case where you have to go to a relatively large investment it is only fair and business—proper business that the Company you are negotiating with *gets a proper return on the investment for that period.* That is the basis upon which we would operate ourselves, we would not expect anybody to go to a large investment which is necessary in order to give the Company capacity they need for any shorter period than that."[32]

[3006]

In cross-examination, Sierra's president further // said:

> "Q. This contract effectively ties Sierra's hands for 15 years, will it not?
>
> A. In what way do you mean?
>
> [28]
>
> Q. Well, because of the fact that you are prohibited from developing any further power facilities of your own?
>
> A. No, I do not think that is true. The contract is worded in that way, if the parties have a modification that is justified I think the parties can get together on it. In other words, only the—the principal thing that

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[31] R. 200, emphasis supplied.

[32] R. 207, emphasis supplied.

> the selling party would have—I might be corrected on this if I am wrong from P.G.&E. Company—would be idle investment. In other words, if we had a development that we found feasible and it came in at a time when any investment was [not][33] made idle by the P.G.&E. in other words, at a time when they might have to put in additional investment even to serve it, it would not penalize P.G.&E. if we went ahead on it and we could make arrangements with them to do so."[34]

In other words, Sierra believed that PG&E's primary concern was its investment and that a modification of the contract for Sierra's benefit would be justified under any circumstance where PG&E's investment was protected. If Sierra's president had exhibited the same reasonable attitude which he expected from PG&E in 1948 toward PG&E in 1952 when requested to renegotiate the present rate in accordance with the order of the California Commission[35] this proceeding would doubtless have been unnecessary.

In the present proceeding in 1953 Sierra's president

[3007]

testified that in his 1948 testimony before the California Commission he gave all the reasons which he could think of in support of the contract. The transcript of that proceeding will be scanned in vain for any indication that PG&E intended to give up any right to initiate a rate increase or that Sierra ever had any such understanding. Are we to

[29]

believe now that it was mere oversight that when the 15-year term was mentioned in 1948, Sierra's pesident thought only of a proper return for PG&E's investment rather than a guaranteed rate for Sierra, even though he was obviously looking for reasons to satisfy his Nevada opposition?

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[33] The context requires insertion of the "not" at this point.

[34] R. 216.

[35] R. 61, 283, 285.

Not quite two years later, before the California Commission in 1950, Mr. Moulton, PG&E's vice president and executive engineer, explained the difference between the 15-year term of the Sierra contract and the 5-year term of other resale contracts as follows:

> "We finally made a 15-year contract with Sierra Pacific. *We made a longer contract because we under-[took]*[36] *to build an additional line to supply them and we felt we needed that protection of a long contract.*"[37]

Even in 1952, after Sierra had determined to oppose any increase by PG&E, Sierra's president before the California Commission on cross examination testified as follows:

> "Q. Is it not a fact, Mr. Tracy, that Pacific Gas and Electric Company was insisting on a 15-year contract in order to protect it in a very large investment that it had to make in facilities in order to bring power to the summit to supply to the Sierra Power Company?
>
> A. I think that works both ways. Yes, our company wished to have a firm contract too to cover our investment." (Ex. 23, pp. 1418, 1419)

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[36] The text has "understood" at this point, clearly a reporter's error.

[37] R. 273. Emphasis supplied. This testimony also shows that Sierra is completely mistaken in interpreting Mr. Moulton's testimony as support for its position that the contract rate could not be changed. Mr. Moulton recognizes that the purpose of the 15 year term was to protect the new investment. This testimony was given within a few months after initiation of service over the new 110,000 volt line to Sierra, and the fact that an increase was not deemed warranted at that time does not constitute a bar to an increase under conditions of greatly increased cost.

[30]

In the same proceeding Sierra's president also testified as follows:

> "Q. Now do you have any question in your own mind as to the right of this Commission to change or modify the terms of contracts made between a public utility and one of its customers?
>
> A. It is my understanding that the Commission has jurisdiction over rates, yes, sir.
>
> Mr. Orrick. I didn't hear that answer. Would you read that back, please? (Record read.)
>
> Mr. Duval. In having jurisdiction over rates, it can increase or decrease the rates, would you agree with that?
>
> A. I presume that."[38]

Protection of investment is not accomplished by ignoring diminishing returns. Failure to allow a fair return on prop-

[3009]

erty devoted to public utility service is // confiscation of that property. To argue that PG&E consented to possible loss of all return for up to 30 years on a new investment in excess of one million dollars is absurd and contrary to the express testimony.

J. The Adoption of Schedule P-31 Charges Does Not Support Sierra's Contention That the Rate Was to Be Fixed for the Contract Term.

When the present contract was being negotiated with Sierra in 1947 and 1948 PG&E had on file with the California Commission two tariffs of general application for intrastate resale electric service to customers who purchased all of their energy requirements from PG&E. One of these, Schedule P-31,[39] offered a rate approximately 10% below the other to resale customers who would enter into a five year contract for service. The contract with Sierra did not [31] incorporate the P-31 rate as such. It simply provided a schedule of demand and energy charges equivalent to those in effect under the P-31 tariff, plus a stand-by charge, and incorporated certain of the conditions of that tariff.

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[38] R.329.

Sierra would argue first that the P-31 rate was established as a fixed rate for the term of each five-year contract **[3010]** and therefore that the Sierra rate is a fixed rate // for the 15 to 30 year term of its contract. We have already shown that the conclusion does not follow because the 15 year term was proposed for protection of the new investment long before the P-31 rate entered into the negtiations. The premise that the P-31 rate could not be changed is equally unsound.

The California Commission has twice increased the P-31 rate since its adoption in 1945. The first occasion was in 1950 in response to PG&E's application for 6% rate increase. The second occasion was in 1952 when the California Commission superseded Schedule P-31 by Schedule R, which is equivalent to the rate proposed in this proceeding. In each of those cases the Commmission excepted from the increase certain named customers but the balance were required to pay the increased rate beginning with the effective date of the general increase regardless of the fact that they were

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[39] R. 299.

[3011]

being served under term contracts.[39a] This is // convincing

[32]

evidence that the California Commission does not regard the P-31 rate as immune from changes when required by increases in the cost level.

The testimony of PG&E's rate engineer in 1945, to the effect that users of the P-31 rate were assured of the lower rate for a five-year term (quoted by Sierra in its brief at pp. 31, 49), sounds impressive when isolated from its context. We believe, however, that a study of the record of that proceeding will show that Mr. Beckett meant "lower than the P-6 resale schedule" and that he did not have in mind a fixed rate regardless of cost considerations. In any event the California Commission has set the matter at rest by granting the increases above described.

[39a] As to the 1950 increase of 6%, Exhibit 18 shows that Pacific requested an increase in each of its filed schedules and was authorized to make such increase for service from April 15, 1950 subject only to the named exceptions. Pacific estimated that it would receive additional revenue of $140,000 annually from resale customers as a result of this increase.

As to the 1952 increase, Exhibit 17 shows that the California commission authorized cancellation of all existing schedules and transfer of customers to the increased schedules applicable to the service rendered, including Schedule R for resale customers subject only to exception for certain listed contracts.

The exception of Sierra from the 1952 increase was expressly stated by the California Commission to be for the purpose of allowing an opportunity for the parties to renegotiate the contract "in the light of the new basic resale schedule," i.e. Schedule R (Ex. 17, p. 41). The refusal of Sierra to negotiate (T. 988) does not convert this exception into a final disposition of the matter by the California Commission. The matter is pending before that Commission in a new proceeding.

K. Sierra Did Not Negotiate on the Basis That an Alternative Source of Power Was Actually Available.

Sierra never did act like a buyer playing one competitor against another. In October of 1947, Sierra's president explained to PG&E that his company was not prepared to continue negotiations, that there was local political pressure to bring Shasta power into Nevada which *hampered*

[3012]

Sierra's negotiation, and that Sierra could not afford to offend Shasta power advocates.[40] It is evident that PG&E was not given the impression that Sierra found anything desirable in the proposal for Bureau power. Instead, Sierra was making it clear that it was faced with public pressure urging "cheap" government power and ignoring the practical re-

[33]

quirements of the situation. The following testimony given by Sierra's president in this proceeding illustrates this point:

> "Q. Mr. Tracy, when Pacific Gas and Electric gave up the fuel escalator clause and submitted the proposed form of contract to you after the agreement on the demand and energy charge, what was your opinion as to why they were willing to give up that clause, which would have tended to protect them against at least one of the larger elements of risk in so long a term contract?
>
> [Objection by Mr. Searls on ground of irrelevancy overruled]
>
> * * * * * * *
>
> A. They did not inform me as to the reason and I certainly would not take it upon myself to guess.
>
> By Mr. Wahrenbrock. Q. Did you think you had outsmarted them on that?

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[40] R. 340.

> A. No. That isn't the correct answer. We thought that we had showed them sufficient reasons for proposing to us a lower rate.
>
> Q. Namely the threat of taking your load some place else.
>
> A. The potentional competition that was *very prevalent. The papers were full of it.* As I testified before, all the groups were active. The Chamber of Commerce had a power committee."[41]

Notice that Mr. Tracy declined to state that he threatened to take his load elsewhere. To him the word "competition" seems to be synonymous with "public pressure" since he stated in his testimony that even after the contract with PG&E was signed and approved by the California Commission, he was bothered by "competition".[42]

[34]

In the face of all this evidence, which boils down to the fact that Sierra could not get the power it needed except from PG&E and the fact that any alternative was bound in the long run to mean high but uncertain costs when all factors were taken into account, Sierra's argument that it gave up a bargaining position or that either it or its customers have lost anything by making a contract with PG&E for service at a rate subject to regulatory change is without foundation.

"The papers were full" of competition and it was "very prevalent", but this sort of competition was more of a problem to Sierra than to PG&E. Sierra had no illusions about the desirability of a contract for Bureau power as is demonstrated by the intra-company communications which list Mr. Devor's or Mr. Tracy's objections to such a arrangement.[43]

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[41] Transcript, pp. 937, 938 (not printed).

[42] R. 54.

[3014]

Sierra was not making fine calculations to determine the cost of various alternatives nor was it trying to extract from PG&E an agreement for an unchangeable rate. The 15-year term was important from the investment standpoint. Sierra endeavored to and did obtain the lowest available rate from PG&E but this was a standard rate, available to qualified resale customers whether or not they had competitive sources of supply.

PG&E undoubtedly felt the effect of the public pressure and concluded that it should offer its standard resale rate, the P-31 tariff, but it did not expect that this rate would be fixed in the face of cost changes.

When called upon at the California hearing in 1948 to justify making the contract with PG&E, Mr. Tracy attempted to educate the public representatives from Nevada to the facts of the situation which Sierra then faced. He

[35]

showed that he really had no choice in the matter. He did not claim that the 15-year term was agreed upon to secure a favorable rate; he explained that it was a necessary protection for the new investments to be made. The public representatives were satisfied with this and withdrew their opposition.

In a few words, neither Sierra nor public opinion were

[3015]

demanding a fixed rate, nothing in the situation required a fixed rate and nothing in the negotiations, the contract, or the explanations of the contract in the 1948 proceeding ever suggested that a fixed rate had been discussed, much less agreed upon.

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[43] R. 347-348, 350-351, 353-355.

Exhibit B

State of New York
County of New York—ss.:

Frank A. Tracy, being duly sworn, deposes and says:

1. I have been President of Sierra Pacific Power Company (the "Company") since 1942, and represented the Company during all negotiations with Pacific Gas and Electric Company ("PG&E") leading to the entering into of the contract between the Company and PG&E made March 4, 1948 and designated as PG&E's Rate Schedule FPC No. 3 (the "contract"). I was accompanied by Mr. William C. MacInnes at some of the more important conferences.

2. To the best of my knowledge and belief, neither Mr. MacInnes nor I ever represented either to Mr. Sutherland or to any other representative of PG&E that it was understood that the rate specified in the contract was subject to change upward or downward either in accordance with changes in any resale tariff or rate filed by PG&E or in accordance with changes in PG&E's costs of service.

3. Prior to October 25, 1947, when PG&E first offered the present contract, I had refused to enter into a form of contract proposed by PG&E which contained escalation clauses, and insisted upon a contract for a lower rate and a fixed term. It was in fact because the contract finally offered met those conditions that the Company accepted it.

[3017]

4. Subsequent to the signing of the contract, // I attended a conference with representatives of PG&E, including Mr. N. R. Sutherland, at which a possible increase in the contract rate was discussed. At that time I told the representatives of PG&E that the Company could not agree to an increase in the rate specified in the contract because of the continued opposition of the Nevada Public Service Commission and representatives of the Company's Nevada customers. However, neither the Company nor I at that time or any other time agreed that PG&E could at a later date increase the contract rate without the Company's consent.

FRANK A. TRACY

Subscribed and sworn to
before me this 7th day
of November, 1956.

MAGDELENE J. NELSON
Magdelene J. Nelson
Notary Public, State of New York
Qualified in Queens County
Certified in New York Co.
No. 41-2864500
Commission Expires March 30, 1957
[Seal]

EXHIBIT C
Page 1 of 3 Pages

COSTS WHICH COULD BE ELIMINATED BY DISCONTINUING SERVICE TO SIERRA PACIFIC POWER COMPANY COMPARED WITH REVENUE UNDER CONTRACT RATE (FPC-3) AND PROPOSED RATE (FPC-3 SUPP. 1)

	1952 $	1953 $	1954 $	1955 $	1956 $	1957 $	1958 $	1959 $	1960-1971 (Each Year same as 1959) $	Total $
Eliminated Costs on Special Facilities serving Sierra Pacific										
Fixed Costs:										
Property Taxes	16,215	21,909	29,887	31,514	33,230	46,725	46,725	46,725	560,700	833,630
Rent	30,000	30,000	30,000	30,000	30,000	30,000	30,000	30,000	360,000	600,000
Insurance Injuries and Damages	1,652	2,209	2,070	1,654	1,658	1,665	1,665	1,665	19,980	34,218
Total Fixed Costs	47,867	54,118	61,957	63,168	64,888	78,390	78,390	78,390	940,680	1,467,848
Operating and Maintenance Costs:										
Maintenance	12,817	14,026	15,740	15,957	15,957	15,957	15,957	15,957	191,484	313,852
Operating Costs	24,170	25,073	26,477	27,239	27,239	27,239	27,239	27,239	326,868	538,783
Customer Accounting and Collecting	546	551	582	599	599	599	599	599	7,188	11,862
Social Security Taxes	721	517	689	706	706	706	706	706	8,472	13,929
Admin. & Gen. Excl. Franchise Requirements	3,655	4,047	4,316	3,919	3,919	3,919	3,919	3,919	47,028	78,641
Pensions	1,153	1,809	3,024	2,382	2,382	2,382	2,382	2,382	28,584	46,480
Total Operating and Maintenance Costs	43,062	46,023	50,828	50,802	50,802	50,802	50,802	50,802	609,624	1,003,547
Total Special Facilities Costs	90,929	100,141	112,785	113,970	115,690	129,192	129,192	129,192	1,550,304	2,471,395
Eliminated Production Costs based on most economical Steam Plant										
Incremental Cost of fuel and variable operative and maintenance costs	740,099	847,630	984,393	968,349	1,306,566	1,525,900	1,614,600	1,670,100	20,041,000	29,698,637
Capacity costs	247,400	278,000	316,800	217,700	241,000	268,200	276,900	276,900	3,322,800	5,445,700
Total eliminated costs	1,078,428	1,225,771	1,413,978	1,300,019	1,663,256	1,923,292	2,020,692	2,076,192	24,914,104	37,615,732
Revenue under Contract Rate	1,228,138	1,383,063	1,692,427	1,946,536	2,200,878	2,458,179	2,600,404	2,669,648	32,035,776	48,215,049
Revenue under Proposed Rate	1,570,892	1,772,041	2,173,409	2,504,241	2,834,566	3,168,677	3,353,249	3,443,362	41,320,344	62,140,781
Avoidable loss with revenue under Contract Rate	(149,710)	(157,292)	(278,449)	(646,517)	(537,622)	(534,887)	(579,712)	(593,456)	(7,121,672)	(10,599,317)
Avoidable loss with revenue under Proposed Rate	(492,464)	(546,270)	(759,431)	(1,204,222)	(1,171,310)	(1,245,385)	(1,332,557)	(1,367,170)	(16,406,240)	(24,525,049)

*This Exhibit C shows PG&E's Submission, Appendix C, Schedule 1, Sheets 1, 2 and 3, revised so as to eliminate the amounts included by PG&E as return at 5.5% on depreciated investment, depreciation expense, and taxes based on income.

[3019]

EXHIBIT C

Page 2 of 3 Pages

DEVELOPMENT OF ELIMINATED CAPACITY COSTS

	Sum of Monthly Sierra Metered Kilowatt Demands at Time of PG&E Peak (1)	Sierra Kilowatt Demands at Primary Sub Input (2)	Sierra Kilowatt Demands at Generation (3)	Unit Capacity Cost Per Kilowatt Month at Generation (4)	Eliminated Capacity Cost (5)
1952	443,600	451,700	501,900	$ .493	$ 247,400
1953	497,900	507,500	563,900	.493	278,000
1954	600,700	613,200	681,300	.465	316,800
1955	693,600	710,000	788,900	.276	217,700
1956	767,900	786,000	873,300	.276	241,000
1957	854,400	874,600	971,800	.276	268,200
1958	882,300	903,100	1,003,400	.276	276,900
1959	882,300	903,100	1,003,400	.276	276,900

Note:

Based on Contra Costa Units 1, 2 and 3 for 1952 and 1953; Based on Contra Costa Units 1, 2, 3, 4 and 5 for 1954; and on Pittsburg Units 1, 2, 3 and 4 thereafter; these being the most efficient and economical plants in operation during the periods considered.

*This Exhibit C shows P G & E's Submission, Appendix C, Schedule 1, Sheets 1, 2 and 3, revised so as to eliminate the amounts included by P G & E as return at 5.5% on depreciated investment, depreciation expense and taxes based on income.

EXHIBIT C

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DEVELOPMENT OF UNIT CAPACITY COSTS

		Contra Costa Units 1-2-3 $	Contra Costa Units 1-2-3-4-5 $	Pittsburg Units 1-2-3-4 $
	FIXED COSTS			
1	Return at 5.5% on Depreciated Investment	—	—	—
2	Depreciation Expense	—	—	—
3	Insurance, Injuries and Damages	42,525	66,449	70,152
4	Property Taxes	957,142	1,471,756	854,986
5	Miscellaneous Revenue	(16,240)	(18,277)	(19,156)
6	Taxes Based on Income	—	—	—
7	Total Fixed Costs	983,427	1,519,928	905,982
	ALLOCATED OPERATING COSTS			
8	No Load Fuel	572,600	1,002,700	670,800
9	Maintenance (75%)	84,000	172,500	206,250
10	Other Operating Costs (75%)	322,623	406,076	332,860
11	Social Security Taxes (75%)	6,485	10,676	7,098
12	A & G Excl. Franchise Requirements (75%)	32,868	59,348	39,457
13	Pensions (75%)	10,359	36,062	23,975
14	Total Allocated Operating Costs	1,028,935	1,687,362	1,280,440
15	Total Capacity Costs	2,012,362	3,207,290	2,186,422
16	Normal Operating Capacity in KW	340,000	575,000	660,000
17	Capacity Cost in $ per KW Yr.	5.92	5.58	3.31
18	Capacity Cost in $ per KW Mo.	.493	.465	.276

*This Exhibit C shows P G & E's Submission, Appendix C, Schedule 1, Sheets 1, 2 and 3, revised so as to eliminate the amounts included by P G & E as return at 5.5% on depreciated investment, depreciation expense and taxes based on income.

EXHIBIT D
Page 1 of 3 Pages

COSTS WHICH COULD BE ELIMINATED BY DISCONTINUING SERVICE TO SIERRA PACIFIC POWER COMPANY COMPARED WITH REVENUE UNDER CONTRACT RATE (FPC-3) AND PROPOSED RATE (FPC-3 SUPP. 1)

	1952 $	1953 $	1954 $	1955 $	1956 $	1957 $	1958 $	1959 $	1960-1971 (Each Year same as 1959) $	Total $
Eliminated Costs on Special Facilities serving Sierra Pacific										
Fixed Costs:										
Property Taxes	16,215	21,909	29,887	31,514	33,230	46,725	46,725	46,725	560,700	833,630
Rent	30,000	30,000	30,000	30,000	30,000	30,000	30,000	30,000	360,000	600,000
Insurance Injuries and Damages	1,652	2,209	2,070	1,654	1,658	1,665	1,665	1,665	19,980	34,218
Total Fixed Costs	47,867	54,118	61,957	63,168	64,888	78,390	78,390	78,390	940,680	1,467,848
Operating and Maintenance Costs:										
Maintenance	12,817	14,026	15,740	15,957	15,957	15,957	15,957	15,957	191,484	313,852
Operating Costs	24,170	25,073	26,477	27,239	27,239	27,239	27,239	27,239	326,868	538,783
Customer Accounting and Collecting	546	551	582	599	599	599	599	599	7,188	11,862
Social Security Taxes	721	517	689	706	706	706	706	706	8,472	13,929
Admin. & Gen. Excl. Franchise Requirements	3,655	4,047	4,316	3,919	3,919	3,919	3,919	3,919	47,028	78,641
Pensions	1,153	1,809	3,024	2,382	2,382	2,382	2,382	2,382	28,584	46,480
Total Operating and Maintenance Costs	43,062	46,023	50,828	50,802	50,802	50,802	50,802	50,802	609,624	1,003,547
Total Special Facilities Costs	90,929	100,141	112,785	113,970	115,690	129,192	129,192	129,192	1,550,304	2,471,395
Eliminated Production Costs based on most economical Steam Plant										
Incremental Cost of fuel and variable operative and maintenance costs	740,099	847,630	984,393	968,349	1,306,566	1,525,900	1,614,600	1,670,100	20,041,000	29,698,637
Capacity costs	375,400	421,800	464,000	366,000	405,200	450,900	465,600	465,600	5,587,200	9,001,700
Total eliminated costs	1,206,428	1,369,571	1,561,178	1,448,319	1,827,456	2,105,992	2,209,392	2,264,892	27,178,504	41,171,732
Revenue under Contract Rate	1,228,138	1,383,063	1,692,427	1,946,536	2,200,878	2,458,179	2,600,404	2,669,648	32,035,776	48,215,049
Revenue under Proposed Rate	1,570,892	1,772,041	2,173,409	2,504,241	2,834,566	3,168,677	3,353,249	3,443,362	41,320,344	62,140,781
Avoidable loss with revenue under Contract Rate	(21,710)	(13,492)	(131,249)	(498,217)	(373,422)	(352,187)	(391,012)	(404,756)	(4,857,272)	(7,043,317)
Avoidable loss with revenue under Proposed Rate	(364,464)	(402,470)	(612,231)	(1,055,922)	(1,007,110)	(1,062,685)	(1,143,857)	(1,178,470)	(14,141,840)	(20,969,049)

*This Exhibit D shows PG&E's Submission, Appendix C, Schedule 1, Sheets 1, 2 and 3, revised so as to eliminate the amounts included by PG&E as return at 5.5% on depreciated investment and taxes based on income.

EXHIBIT D
Page 2 of 3 Pages

DEVELOPMENT OF ELIMINATED CAPACITY COSTS

	Sum of Monthly Sierra Metered Kilowatt Demands at Time of PG&E Peak (1)	Sierra Kilowatt Demands at Primary Sub Input (2)	Sierra Kilowatt Demands at Generation (3)	Unit Capacity Cost Per Kilowatt Month at Generation (4)	Eliminated Capacity Cost (5)
1952	443,600	451,700	501,900	$ .748	$ 375,400
1953	497,900	507,500	563,900	.748	421,800
1954	600,700	613,200	681,300	.681	464,000
1955	693,600	710,000	788,900	.464	366,000
1956	767,900	786,000	873,300	.464	405,200
1957	854,400	874,600	971,800	.464	450,900
1958	882,300	903,100	1,003,400	.464	465,600
1959	882,300	903,100	1,003,400	.464	465,600

Note:

Based on Contra Costa Units 1, 2 and 3 for 1952 and 1953; Based on Contra Costa Units 1, 2, 3, 4 and 5 for 1954; and on Pittsburg Units 1, 2, 3 and 4 thereafter; these being the most efficient and economical plants in operation during the periods considered.

*This Exhibit D shows P G & E's Submission, Appendix D, Schedule 1, Sheets 1, 2 and 3, revised so as to eliminate the amounts included by P G & E as return at 5.5% on depreciated investment and taxes based on income.

EXHIBIT D

Page 3 of 3 pages

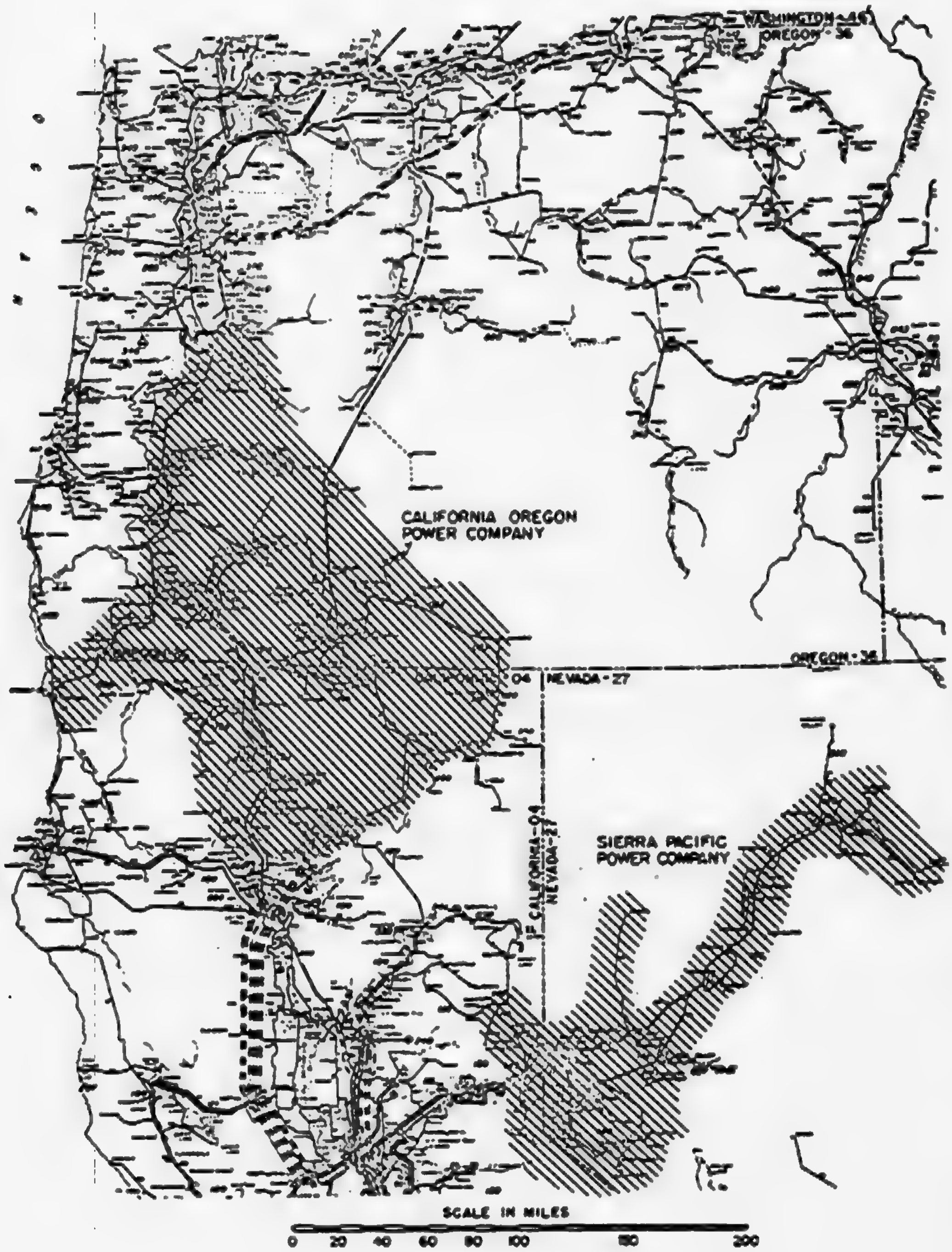
DEVELOPMENT OF UNIT CAPACITY COSTS

		Contra Costa Units 1-2-3 $	Contra Costa Units 1-2-3-4-5 $	Pittsburg Units 1-2-3-4 $
	FIXED COSTS			
1	Return at 5.5% on Depreciated Investment	—	—	—
2	Depreciation Expense	1,040,674	1,487,686	1,488,746
3	Insurance, Injuries and Damages	42,525	66,449	70,152
4	Property Taxes	957,142	1,471,756	854,986
5	Miscellaneous Revenue	(16,240)	(18,277)	(19,156)
6	Taxes Based on Income	—	—	—
7	Total Fixed Costs	2,024,101	3,007,614	2,394,728
	ALLOCATED OPERATING COSTS			
8	No Load Fuel	572,600	1,002,700	670,800
9	Maintenance (75%)	84,000	172,500	206,250
10	Other Operating Costs (75%)	322,623	406,076	332,860
11	Social Security Taxes (75%)	6,485	10,676	7,098
12	A & G Excl. Franchise Requirements (75%)	32,868	59,348	39,457
13	Pensions (75%)	10,359	36,062	23,975
14	Total Allocated Operating Costs	1,028,935	1,687,362	1,280,440
15	Total Capacity Costs	3,053,036	4,694,976	3,675,168
16	Normal Operating Capacity in KW	340,000	575,000	660,000
17	Capacity Cost in $ per KW Yr.	8.98	8.17	5.57
18	Capacity Cost in $ per KW Mo.	.748	.681	.464

*This Exhibit D shows P G & E's Submission, Appendix C, Schedule 1, sheets 1, 2 and 3 revised so as to eliminate the amounts included by P G & E as return at 5.5% on depreciated investment and taxes based on income.

[3024]

EXHIBIT E


WASHINGTON-46
OREGON-36
IDAHO-11
CALIFORNIA OREGON POWER COMPANY
OREGON-36
OREGON-36
CALIFORNIA-04
NEVADA-27
CALIFORNIA-04
NEVADA-27
SIERRA PACIFIC POWER COMPANY
SCALE IN MILES
0
20
40
60
80
100
150
200

[3026]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY SIERRA PACIFIC POWER COMPANY	Docket No. E-6482 Docket No. E-6697

Closing Submission of Pacific Gas and Electric Company

* * * * * * *

[3028]

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[Title of Commission and Cause Omitted]

CLOSING SUBMISSION OF PACIFIC GAS AND ELECTRIC COMPANY

Sierra's reply presents a rambling discourse seemingly more intent on impugning motives than metting issues. In this Closing Submission we have attempted to weed out the many irrelevancies and unsupported statements in the Reply and focus attention on the issues.

We shall discuss the points raised in Sierra's reply under four headings which will correspond to the four headings found in the reply.

[3031]

I.

The 1948 Contract Contemplated a Changeable Rate.

Sierra's splenitive attack upon P.G.&E.'s argument that the Commission should now decide the issue it did not reach before—the true nature of the contract rate—is filled with inconsistency, erroneous reasoning, disregard of the record in the previous proceedings, and a virtual admission of the changeable nature of the contract rate.

For the first 17 pages Sierra contends P.G.&E.'s argument as to the nature of the contract is "entirely new" and therefore cannot be considered. Then it "concedes" that the argument is not new at all but suggests that the argument cannot be considered, anyway, because the Supreme Court has decided the *facts* of the case as as well as the law of the case! Then, hesitating to reply upon this peculiar position, Sierra urges that the parol evidence rule bars P.G.&E. from introducing further evidence as to the circumstances surrounding the 1948 contract, even though Sierra has already produced the same kind of evidence for its own purposes. Finally, apparently acceding to the inevitable, Sierra offers

an affidavit of Mr. Frank Tracy // in opposition to the proffered testimony of Mr. N. R. Sutherland on the changeable nature of the 1948 contract rate. The affidavit, however, is anything but a direct denial of Mr. Sutherland's verified statements and indicates a virtual acceptance of them.

With this brief introduction, let us examine in more detail these various aspects of Sierra's strange reply.

1. P.G.&E.'s "basic contention" 'as to the meaning of the contract has remained unchanged.

Throughout the first 17 pages of its reply, Sierra attempts to characterize P.G.&E.'s argument on the meaning of the contract as "an entirely new 'basic contention' ",[1] not heretofore presented to the Commission in the earlier proceedings. We find all manner of castigating and repetitive assertions against P.G.&E. in these first pages. It is declared to be "fantastic"[2] and "preposterous"[3] for P.G.&E.

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[1] Reply, p. 3. See also p. 16 ("P.G.&E.'s *new* 'basic contention' "), p. 18 ("its *new* 'basic contention' "), and p. 15 ("the *new* theory").

[2] Id. pp. 3, 7, 9.

[3] Id. p. 4.

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"to believe it could . . . seriously"[1] "*now* ask . . . the Commission to find"[2] "after three and a half years of litigation"[3] upon an "entirely *new* basic contention"[4] which is so "belated."[5] It is said that this "*present* contention"[6] indicates of P.G.&E. that "its 'basic contention' is *no longer* that the contract rate is . . . adverse to the public interest".[7] It is said that P.G.&E. has "abandoned"[8] its earlier argument in favor of the present "desperate expedient"[9] of "*now* assert[ing] that its 'basic contention' is that the contract rate 'was not meant to be firm for fifteen years or longer but was meant to be subject to change upward or downward to reflect changes in P.G.&E.'s cost of service' . . ."[10]

To read through these first 17 pages of Sierra's reply (without checking the record) one would certainly tend to gain the impression that Sierra believed P.G.&E. has never before made the alleged "new" contention. One would further gain the impression that Sierra was asking the Com-

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[1] Reply, p. 3.
[2] Id. pp. 3, 10.
[3] Id. p. 3.
[4] Id. p. 3. See also pp. 16, 18, 15.
[5] Id. p. 7.
[6] Id. p. 14.
[7] Id. p. 7.
[8] Id. p. 3.
[9] Id. p. 7.

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mission to // disregard this "new" argument on the very ground that it is "new" and therefore precluded from consideration. In fact, Sierra strives so hard to create the impression that P.G.&E.'s contention is "new" that it devotes some 4 pages of its reply[1] to a citation and discussion of cases dealing with the well known proposition that a litigant may not try his case "piecemeal"—i.e., first on one theory and then, if that fails, on another.

The complete answer to all this talk in the first 17 pages of Sierra's brief about a "new" contention is, of course, obvious. One has merely to look at the record. The contention is not "new". P.G.&E.'s basic contention before the Commission has always been that the parties to the 1948 contract rate never intended the contract rate to be firm for a period of 15 years or more but fully understood that it was to be a changeable rate. (See pp. 16 to 40, Op. Br. of P.G.&E., F.P.C. Docket E-6482.) In fact, P.G.&E.'s Reply Brief before the Commission was devoted *entirely* to this single point. (Reply Br. of P.G.&E., F.P.C. Docket E-6482.) The most amazing feature of Sierra's reply is that after some 17 pages of arguing vehemently that P.G.&E. cannot "now" present a "new" contention to the Commission, Sierra, in the next 2 pages, openly concedes that P.G.&E. is not

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presenting a new contention // at all. We quote from pages 18 to 19 of Sierra's reply:

> [P]ages 16 through 40 and 5 through 25 of P.G.&.E.'s opening and reply briefs on the prior hearings . . . are replete with . . . assertions . . . that the 'understanding of the parties' was 'that the contract which was executed was intended to be subject to change . . . ." * * * *We concede, therefore, that the 'basic contention' now tendered by P.G.&E. was presented to the Commission on the prior hearings."* (Emphasis ours.)

One truly wonders how in good conscience Sierra can require the Commission to labor through 17 pages of in-

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1. Reply, pp. 11-14.

temperately worded argument when on the 18th and 19th pages Sierra "concedes" that the argument was entirely misguided. One would expect that a proper regard for relevancies, if nothing else, would have dictated Sierra's deletion of the entire irrelevant portion of the brief.

Suffice it at this point, however, merely to observe further that additional comment is unnecessary on the authorities cited and discussed by Sierra on pages 11 to 14 of its reply. The cases cited, as we have noted, deal only with the situation where a litigant has lost a case tried on one theory and then seeks a "second chance" to win it by trying it over again on a completely new theory—hardly the case we have here, as Sierra so belatedly concedes.

[3036]

2. The Supreme Court did not "hold" what the facts were.

Beginning on page 18 of its reply, Sierra takes the surprising position that, even though the Commission made no findings as to whether the contract rate was or was not for a firm rate,[1] the Supreme Court somehow may be said to have "passed upon"[2] the conflicting evidence presented to the Commission on this point and "decided adversely to PG&E"[3] the "conclusions"[4] to be drawn from this evidence.

In taking such a position, Sierra demonstrates an almost unbelievable misunderstanding of the function of appellate processes. It appears that Sierra believes an appellate court determines and decides disputed questions of *fact* as well as disputed questions of law. Sierra's misapprehension in this respect underlies its entire argument but is strikingly demonstrated by its language in several specific instances. For example, at pages 50 to 53 Sierra reviews

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1. As we pointed out in the Supplemental Motion herein (pp. 2-3) and in our Submission herein (pp. 10, 21), the Commission took a view of the law which made a finding unnecessary on this point, and no such finding was ever made. (See Opinion No. 270, 7 P.U.R. 3rd 256.)

2. Reply, p. 19. See also pp. 15, 21.

3. Id. pp. 18, 19.

4. Id. p. 51. See also p. 9: "every factual issue . . . was presented . . . to the Supreme Court, and decided against P.G.&E.'s contentions . . . ."

some of the conflicting evidence presented to the Commission and then argues as though the Court of Appeals and the Supreme Court made findings of *fact* based upon this conflicting evidence. We quote:

> "[T]he courts *drew* precisely the *conclusions* from this *evidence* which we have advanced . . . . Thus, the Court of Appeals . . . *found the facts* to be as follows: * * * [T]he Supreme Court's opinion . . . is . . . to the same effect. * * * It is . . . startling to find a member of the bar of the Supreme Court of the United States [disputing] what the Supreme Court has *found the facts to be* . . . ." (Emphasis ours.)

At page 21 Sierra makes the following statement:

> "The major difficulty with PG&E's supplemental motion to reopen is that both the law *and the facts* . . . have been expressly passed on and decided against it by the Supreme Court of the United States." (Emphasis ours.)

Elsewhere Sierra refers to the Supreme Court's opinion as having "held"[1] that certain facts existed and as being "a decision as to the facts."[2]

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[1] Reply, pp. 20, 10, 31. See also p. 54.

[2] Id. p. 49.

Sierra's entire attitude is summed up by its statement at page 53 of its reply where, with brash but mistaken confidence, Sierra says that "the Supreme Court has found the facts" and "the Supreme Court has the last word".

Sierra's confidence in the "facts" portion of the Supreme

[3038]

Court's opinion is grossly misplaced. The Supreme // Court does not have *any* word on disputed facts, let alone the "last word" on them. One of the most elementary of the principles governing appellate procedure is that the conclusion to be drawn from conflicting evidence is strictly a matter for the trier of fact i.e., the lower court or, as here, the Commission. The Supreme Court in the present case did not for a moment purport to usurp the function of the Commission and decide the disputed questions of fact that had been presented to the Commission for decision.

Sierra's misconception of the effect of the Supreme Court's opinion apparently stems from its complete failure to understand the significance of that portion of an appellate court opinion which comprises the statement of fact. The statement of fact is, of course, a statement of the factual assertions in the case below which, whether true or not, bring up a legal issue for decision by the appellate court. Sierra seems to think that such a statement of fact is a "holding" on disputed questions of fact. It is, of course, no such thing, as is shown from the established rule that statements of fact by the appellate court do not at all fix what facts may be found to be true on a retrail of the

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cause.[1] As is // well known, it is only the trial court (or correctly or incorrectly, the statement in no manner controls the court below, and cannot prejudice the parties where a new trial is had. It is upon questions of law that the decision of the appellate court becomes the law of the case, and not upon questions of fact.' ") See also cases collected at 4 Cor. Jur. 1218-1219 (5 Cor. Jur. Sec. 1509-1510).

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[1] *E.g., Allen v. Bryant*, 155 Cal. 256, 263, 100 Pac. 704, 807 (1909). ("'If this court states the evidence in a cause, whether

the Commission here) which has the functions of deciding disputed questions of fact. An appellate court's statement of fact is not for an instant to be taken as something which usurps that fact-finding function and decides disputed factual questions. Statements of fact in an appellate court opinion are no more than they purport to be—statements of the particular evidence which presents the legal issue for decision. It is true, of course, that once an issue raised by the statement of fact given in an appellate opinion is decided the decision reached becomes the "law of the case" —but only *for the particular facts outlined in the Statement.* It is axiomatic that the "law of the case" has no application if upon a retrial the facts are found to be different from those outlined in the appellate court's statement of fact.[1]

An illustration may help Sierra's understanding on this point. A common example of the non-binding nature of an appellate court's statement of fact, and one particularly pertinent here, is the situation arising with judgments based upon directed verdicts, nonsuits, demurrers to complaints, or similar rulings of law. Appellate decisions reviewing such judgments call for a discussion of only the

evidence contended // for by the losing party. This is so because the lower court has ruled, as a matter of law, that the evidence of the losing party does not make out a case. An appellate court's statement of fact, therefore, need only mention the facts contended for by the losing party in the court below—for it is those facts, and those facts alone, which present the legal issue for decision. Such a statement of fact, however, is not a "holding" by the appellate court that the facts stated are true. It merely means that those are the facts which must be assumed for purposes of the decision—i.e., the facts asserted by the losing party which give rise to the question of law decided by the court below and presented for review by the appellate court. Whether the trier of fact would find these facts to be true if asked to consider them is an entirely different matter and is immaterial to the ruling of law which must be made by the appellate court. The case is presented to the appellate court on the trial court's theory that, as a matter of law, it makes no difference whether the facts contended for by the party are true or not. Implicit in all such cases is the realization that, should the trial court be reversed and a retrial ordered, the trier of fact is still free to decide the truth or falsity of the facts contended for by the respective parties.

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[1] E.g. *Moore v. Trott*, 162 Cal. 268, 122 Pac. 462 (1912) (circumstances strikingly parallel to our case here), See also cases collected at 4 Cor. Jur. 1217 (5 Cor. Jur. Sec. 1508-1509).

[3041]

Thus, as can be seen, the statement of fact made // by an appellate court in establishing the law of the case applicable to the facts contended for by a losing party after a directed verdict, a nonsuit, or a judgment similar in effect is not in any sense a "holding" as to the truth or falsity of the facts stated and does not restrict the power of the trier of fact to find the true facts upon a retrial. The cases supporting this doctrine are legion.[1]

A moment's reflection by Sierra should reveal to it that the present status of the Commission proceedings is precisely similar to that where a retrial is sought after a reversal of a judgment based on a directed verdict or nonsuit. In the present case, as in a directed verdict situation, the Commission heard evidence from both sides as to whether the contract rate was intended to be firm or changeable. Instead of determining the disputed factual question, however, the Commission, in response to legal arguments of its Staff,[2] made a ruling of law similar to the kind made on a directed verdict. It ruled that it was not necessary to decide the disputed question of fact because it made no difference whether or not Sierra's contention on the facts were true. Even if the contract were for a firm rate, the Commission rules, Sierra had not made out a case as a

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matter of law. // The Commission ruled that under the Federal Power Act even a firm contract rate could be superseded by a filing under Section 205 of the Act. Thus as in a directed verdict or nonsuit situation, the Commission considered it unnecessary to determine the truth or falsity of Sierra's factual assertions and held as a matter of law that the facts relied upon by Sierra, assuming them to be true, did not entitle Sierra to relief. To test the validity of this legal ruling, the Court of Appeals and the Supreme Court necessarily had to *assume* that the facts were as contended by Sierra. But obviously neither court *decided* or "held" what the true facts were. The statement of fact appearing in the opinion of each of these courts is no more than what

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[1] See cases collected at 4 Cor. Jur. 1217-1219 (5 Cor. Jur. Sec. 1508-1510).

[2] See Brief for Commission's Staff, F.P.C. Docket E-6482.

it purports to be—a statement of the facts it was necessary to assume in order to decide the legal question raised.

In an attempt to bolster its argument that the Supreme Court decided the facts, Sierra calls attention to various factual asserions made in the briefs before the Supreme Court. The presence of this factual material in the briefs, however, does not mean that factual questions were "before"[1] the Supreme Court for a decision. It means only that the facts were in dispute. In the absence of findings by the Commission, the persistence of the parties in telling their own versions of the facts was, of course, to be expected. But this does not mean that the Supreme Court was called upon to decide the facts. Nor does it mean that the Court did decide them, or that it could decide them.

The simple truth of the matter is that a decision on the facts was not necessary to a disposition of the case, and no such decision was purported to be made by the Supreme Court. If and when the Supreme Court does purport to make a determination with respect to factual contentions, such as when it is called upon to decide "mixed" questions of fact and law, the Court makes its decision expressly, stating in substance, for example, that as a matter of law the evidence does not support a particular finding of fact of the tribunal of first instance—and this is true whether such tribunal be a trial court or, as here, an administrative agency. That the Supreme Court in the present case did not regard the factual material in the briefs as calling for some such decision on the facts is plainly attested to by the very form of language used by the Court in treating what is considered to be the issues up for decision.

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[1] Reply, p. 19.

The merest reading of the opinion is sufficient to show that the Court did not at all consider that there was being "presented"[1] to it, or that it was deciding, or that

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[1] Reply, p. 19.

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it had the jurisdiction to decide, the disputed factual question as to whether the parties did or did not understand that the contract was for a changeable rather than a fixed rate. It is quite apparent that the Supreme Court did not *decide* any facts at all. It merely *assumed* certain facts to be in Sierra's favor so that it could reach the question of law posed as a result of the Commission's rejection of the idea that the facts contended for by Sierra had legal significance. This, and nothing more, appears from the statement of fact preceding the Court's opinion.

In sum, the short answer to Sierra's argument is that the Supreme Court decided the *law* of the case, not the facts.

[3045]

3. Neither the parol evidence rule nor the affidavit of Mr. Frank Tracy gives any reason for denying the Supplemental Motion.

The remainder of Sierra's reply as to the Supplemental Motion consists of an argument on the parol evidence rule and a much-labored argument on the facts, based upon a particularly weak affidavit by Mr. Tracy.

With respect to the parol evidence rule, we note that Sierra wants the rule to work only one way—in favor of Sierra. Now that Sierra has already produced its evidence on the "circumstances"[1] of the 1948 contract, it appears that Sierra would like to have P.G.&E.'s evidence excluded. Suffice it to say that Sierra, having opened the door to parol evidence, is hardly in a position to complain about the evidence that may now come in through that door—disturbing though the evidence may be to Sierra!

With reference to Mr. Tracy's affidavit, it is so weak as to make us wonder why it was even included. Rather than making a direct denial, it makes a number of such qualified and guarded statements that we find Sierra first straining to explain what it means (pp. 22-23) and then hastening to shore it up with a number of other factual arguments, each of which, however, is refutable on its

[3046]

face (pp. 23-25). But even if the affidtvit of Mr. Tracy could be considered a direct denial of the verified statements made by Mr. N. R. Sutherland in the Supplemental Motion and in the Submission, the affidavit would at most create a conflict in the evidence. This alone would be a cogent argument for granting the Supplemental Motion.

[3047]

II

The Contract Rate Is Contrary to the Public Interest

Sierra's argument with respect to the effect of the contract rate upon the public interest is notable principally for failing to meet the issues which are present in the factual situation.

1. A contract for service at a rate below avoidable costs of service is contrary to the public interest.

As we have shown[1] in our Submission, it is a basic principle that public utility service should not be rendered at a rate which fails to cover the avoidable costs of service. Neither this Commission nor any similar regulatory body

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1. Reply, p. 50.

should permit a utility to pour its resources (which after all are limited) into facilities, materials, and supplies for the rendering of a service to some favored customer. Sierra claims[2] that such a contention is "erroneous as a matter of law". No reasoning or authority whatever is given for this bald statement.

1. Submission, pp. 35-37.
2. Reply, p. 30.
3. Submission, pp. 33-34.

[3048]

As we pointed out in our Submission,[3] the basic // principle upon which we rely is so obvious that Sierra accepted it in its original brief to this Commission. Sierra even now does not disavow its original statement, but is content to argue that this principle was not a "legal consideration."[1] We agree that it is essentially a matter of fact for the Commission to consider, but the guiding principle is the same whether it be called a "legal" or a "factual" consideration for the Commission.

Sierra makes an attempt to avoid its original acceptance of the principle that failure to cover out-of-pocket costs is contrary to the public interest by stating that it used this argument only because of certain testimony of Mr. Beckett, a P.G.&E. witness. This seems to mean no more than that Sierra is willing to use the principle when it serves its purpose, but is unwilling to accept the consequences of the principle when the true facts are known.[2]

The essence of Sierra's position is found in the statement that "proof of an 'out-of-pocket loss' merely proves proceedings was on a different basis. We remind Sierra, however, that even with the facts as previously developed we pointed out that Sierra was incorrect in contending that out-of-pocket costs were being met. (See P.G.&E.'s Reply Brief, p. 18.)

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[1] Reply, p. 32.

[2] The facts were not developed on an out-of-pocket basis because the approach to the case taken by the Commission in the original

[3049]

that the contract is 'unprofitable' ".[1] This statement, like so many in Sierra's reply, shows that Sierra misses the point entirely. Proof of an out-of-pocket loss, as opposed to mere vanishing *profits,* shows that resources of a public utility devoted to public use are being slowly eroded away by unreimbursed expenditures for one favored customer—here, a loss of over half a million dollars a year. We are not speaking here of a mere reduction in *profit* but of a loss *which occurs after the profits for the service have already been wiped out!*

2. P.G.&E.'s avoidable or out-of-pocket costs of serving Sierra exceed the revenue under the contract rate.

The above statement has been fully established by the showing in Appendix C of our Submission. We state, and Sierra does not deny, that all of the costs which we have included as avoidable costs would actually be eliminated if service to Sierra were discontinued. We emphasize the fact that Sierra has not attempted to contend that any of these costs would not be eliminated under such circumstances. In another one of its bald assertions, however, Sierra says that "obviously" the costs of paying a return

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[1] Reply, p. 34.

[3050]

on investment // in generating facilities should not be taken into account in determining avoidable costs. Sierra gives no explanation of course, as to how it thinks P.G.&E. could possibly obtain the capital required by its obligations to build new plant without incurring these capital costs.

Sierra tries to make light of our showing by saying that it merely proves that P.G.&E. would make more money by selling the energy to customers other than Sierra—ignoring the salient point in our Submission that, *by not having to generate energy for Sierra,* we would save certain costs which necessarily are being met by P.G.&E's other customers. There is not one word to deny that all of these costs would indeed be avoidable by abandoning the Sierra service.

As a sidelight on Sierra's inaccurate presentation we note its assertions that the expenses which we included for steam plant generation are "inflated"[1] or "most expensive"[2]. Precisely the contrary is true. We have actually given Sierra the benefit of the lowest steam electric generating costs on the P.G.&E. system.[3]

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1. Reply, p. 35.
2. Id. p. 36.
3. See P.G.&E. Submission, App. C, Schedule 1, Sheet 7.

3. The contract rate would burden other customers.

We submit that the foregoing arguments, without more, conclusively establish that the contract rate is so low as to be contrary to the public interest. However, we turn to Sierra's contention with respect to our additional showing of the effect on cost of money and the resulting unavoidable burden on other customers.

Preliminarily we should note Sierra's contention that no burden on other customers has *yet* resulted from increased cost of money because increased cost of money acts only "ultimately" by a process of "slow and insidious attrition" and not right away.[1] As with so many of Sierra's contentions, this one too overlooks the real point. It may be true that the "slow and insidious attrition" takes some time to work its harm. The point, however, is that any rate which *starts* such a harmful process is an unlawful rate under the Power Act.

Essentially, Sierra concedes the relation between net revenues and cost of money. There appears to be nothing more to Sierra's argument than a misguided assertion that the effect on cost of money is "de minimis". Actually the Commission considers issues of similar relative magnitude in almost every rate case which comes before it. Certainly it should not regard an eleven million dollar loss as beneath its notice. The fact of the matter is that a utility's revenues, costs, and return are made up of a large number of individual items, each of which enters into the end result, and none of which can be disregarded by the Commission in making its determination of what is in the public interest. We are fully supported in our position by the *Central Maine Power Company* case cited on page 39 of our Submission and unchallenged by Sierra.

Sierra seems to argue further that, even if the effect on cost of money is real, the burden of that increase can be shifted from P.G.&E.'s customers to its stockholders. Our point is, of course, that such a shifting is not feasible without impairment and possible destruction of the Company's credit. If Sierra means that P.G.&E. is to be deprived not only of a portion of its actual avoidable costs of serving Sierra, but also a portion of its cost of money (i.e., that portion representing the increase in cost of money), then we would indeed have a vicious spiral. The failure to cover these costs of money in revenues would undoubtedly result in a further increase in the cost of money because of the added risk which investors would see in this situation. If this increase in cost of money were in turn disallowed, we

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[1] Reply, pp 28, 5-6.

would have another turn of the spiral and so on. We submit that Sierra's argument fails to face the economic facts which are present in this situation and that it must, therefore, be rejected.

4. The contract rate is unduly discriminatory.

A rate differential of 22% in favor of one customer as compared to other customers similarly situated is discriminatory when not justified by cost or value of service and that discrimination is particularly undesirable when the lower rate is given to a customer for which the costs of service are higher.

Sierra argues that there is no discrimination with respect to Copco because Copco's rate does not exceed the cost of service and its (Copco's) ultimate consumers are not placed at a competitive disadvantage.[1] Applying this same line of reasoning, Sierra's rate *fails* to cover the cost of serving it, and its ultimate consumers are placed at a competitive *advantage* as compared to Copco. This is more than a mere lack of uniformity. It is rank favoritism of the consumers in one state over the consumers in another.

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[1] Reply, p. 45.

Sierra argues "the fact that the [contract] rate may be lower than that available to the distributing companies which are less fortuitously situated certainly does not make it 'unduly discriminatory' ".[1] This ignores the fact that the Sierra rate was not lower than that available to other distributing companies at the time it was originally offered. Sierra seeks advantage now, not by reason of some "fortuitous situation", but simply because costs of service have risen without Sierra's rate being comparably increased. The costs of service have increased fully as much with respect to service to Sierra as they have to other customers, and there is no justification for arguing that Sierra is merely trying to preserve some special advantage inherent in a "fortuitous situation".

Of course, if Sierra is arguing that the effect of the contract is to give it some special advantage over other customers, it is begging the question. If contracting *per se* could make any rate "duly" discriminatory, there would never be any occasion to apply the Supreme Court's standard of "undue discrimination". If this standard is to have any meaning at all, it must be applied on the basis of facts external to the contract as we have done.

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[1] Reply, p. 46.

Sierra's remaining arguments on discrimination hardly seem worth notice. For example, Sierra makes comparison with situations which are not only dissimilar, but even involve rates of *other* suppliers to *their* customers. Lastly, Sierra questions P.G.&E.'s right to raise the issue of discrimination, completely disregarding the fact that where the public interest is involved, the Commission is free to act. The weakness and irrelevancy of these arguments are testimony to the difficulties which Sierra finds in defending against the fact of discrimination.

[3056]

III

P.G.&E. Received No Off-Setting Benefits from the Contract.

Sierra's eight pages of discussion on the subject of offsetting benefits disclose the simple concession that P.G.&E. would have been better off without the 1948 contract. Certainly there is no dispute as to the facts which we stated or the conclusion to be drawn therefrom.

Clearly, this should dispose of the whole issue, but Sierra tries to camouflage the facts by a lengthy discussion of the "wheeling" alternative. Here Sierra's counsel place great emphasis upon a possibility that was not suggested by Sierra as an alternative means of obtaining power in any of the documents which it prepared prior to or during the negotiations with P.G.&E. in 1947 and 1948. Actually, in its strenuous endeavors to show that a competitive situation existed in 1947 and 1948, Sierra offered not one word of testimony before the California Public Utilities Commission in 1952 or before this Commission in 1953 to the effect that wheeling was a possible alternative source of supply. Furthermore, in the statement of the Nevada Public Service Commission by which Sierra places such store, there is no suggestion that wheeling was an available alternative for

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power service to Sierra. Lastly, // in its briefs to this Commission, Sierra did not suggest that wheeling was a possible alternative source of power.

It is perfectly plain that the wheeling idea is constructed entirely from hindsight on the basis of the fact that P.G.&E. analyzed for its own purposes the wheeling possibilities. Why, then, does Sierra belatedly attempt to place the burden of its argument upon this wheeling alternative? Again the answer is clear. None of the alternative sources of power which Sierra mentioned in its sworn testimony could possibly have supplied the kilowatts which Sierra anticipated it would need, in time to meet that need. We have previously pointed out the ridiculous lengths to which counsel for Sierra went in attempting to get around these simple facts.[1] It is obvious that this retreat to a backwards view of the subject is necessitated by the complete absence of any support for the argument in the contemporaneous view which the parties held and testified to at the time the contract was made.

In any event the discussion by Sierra fails to establish any benefits to P.G.&E. to offset losses under the contract rate nor any reason why Sierra should not pay the costs of serving it.

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[1] P.G.&E.'s Reply Brief, pp. 20-21.

IV

Sierra's Complaint Is Ill-Founded.

Like the rest of its reply, Sierra's reply to our Submission with respect to Sierra's complaint fails to meet the issues raised. All of the defenses to the complaint which are raised in our Submission are ignored by Sierra, save one. And as to that defense, Sierra's treatment of it is, first, deceptive and, second, an erroneous statement of the law.

The defense dealt with by Sierra is our point that P.G.&E. must continue to charge Sierra at the rate now on file, i.e., Schedule F.P.C. No. 3, Supplement No. 1, until such time as the Commission either rejects the filing or directs that some different rate be paid. Sierra's first answer to this contention is to make the misleading statement that the Supreme Court held that the rate now on file was "'a nullity'".[1] The Court, of course, did no such thing. The phrase quoted by Sierra was lifted directly from the *Mobile*[2] decision *and nowhere appears in the Sierra*[3] *decision!* In *Sierra* the Court by no means held that the filing of the new rate was a complete "nullity". It held, instead,

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[1] Reply, p. 56.

[2] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[3] *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, 12 PUR 3d 122 (1956).

that // the filed rate could have been effective if only the Commission's order allowing it had been "based on the necessary findings".[1] Accordingly—far from holding that the filing was a "nullity"—the Court remanded the case for "such further proceedings . . . as the Commission may deem desirable".[2]

Sierra's second purported answer to the one contention it treats is a statement by it that section 313(b) of the Federal Power Act requires P.G.&E., rather than the Commission, to implement the decree of the Supreme Court because under section 313(b) the final decisions of courts, according to Sierra's counsel, "require no implementation from the Commission".[3] Sierra's counsel, however, to present such an idea, must embellish section 313(b) with a concept that does not appear there. The section says nothing whatever as to whether "implementation" of the final decisions is or is not required by the Commission. All that the section says is that, on review of a Commission order, the decision of the Court of Appeals "shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification . . .". Nothing is said in the statute

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1. *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, ..., 12 PUR 3d 122, 125 (1956).

2. *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, ..., 12 PUR 3d 122, 126 (1956).

3. Reply, p. 57.

[3060]

about implementing the court decisions after they become final. In fact, section 313(b) states that on appeal "the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive" and the Supreme Court in both its opinion and orders recognizes the paramount jurisdiction of the Commission to be the arbiter of the facts.

Since Sierra has not even attempted to answer our other points with respect to Sierra's complaint, we need not repeat them here. The Commission will find these points under heading IV of our Submission, pages 54 through 63.

We find Sierra's attitude in opposing a hearing on its own complaint to be paradoxical, to say the least. Although Sierra went to the length of actually filing this formal complaint in an effort to have the Commission clarify the rights of the parties, Sierra seems to believe that the complaint should be acted upon without an opportunity for a hearing. We find it strange indeed that Sierra opposes a hearing on the very matter it has raised by its own complaint.

[3061]

Sierra Overlooks that a Hearing Is Necessary to Resolve the Issues in Sierra Pacific Power Co. v. P.G.&E.

Sierra in its reply completely ignores the point[1] that its own suit now pending in the Federal District Court necessitates further proceedings by the Commission.

As shown in our Submission[2], we have moved the Federal District Court to stay the proceedings there because the Commission has primary jurisdiction over the central issue in the case, i.e., the "lawfulness" of the rates in question. In support of this motion we have filed in court two memoranda of points and authorities amply documenting our position with the pertinent legal authorities.[3] Under the authorities, it is clear that the primary jurisdiction to decide the issue brought into court by Sierra lies with the Commission and the court must "stay its hand" and await a decision by the Commission before it can determine the case.[4]

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1. Submission, pp. 14-15, 17-18, 23-24, 65, and Appendix B.

2. Submission, pp. 14-15, 23-24, and Appendix B.

3. Copies of our points and authorities are appended to the Submission as Appendix "B".

4. Due to recent requests by Sierra for continuances, our motion in the District Court has been continued for hearing until December 17, 1956, with the understanding that the hearing will be continued from time to time until after the Commission acts on the motions to reopen the rate proceeding.

Wholly aside from the other points raised in our Submission, the pendency of this court action amply demonstrates by itself the need for further hearings. Sierra's silence on this point is mute testimony to the correctness of our position.

Conclusion

Both the public interest and the needs of justice require the Commission to hold hearings and make further determinations in the rate matter which is the subject of these

This material will be found at pp. 398-400 of this volume.

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This material will be found at pp. 398-400 of this volume.

consolidated Dockets Nos. E-6482 and E-6697.

By reason of the circumstances and points described in our Motion for Reopening and Further Hearing, our Supplemental Motion for Reopening and Further Hearing, our Submission and this Closing Submission, we respectfully urge that the Commission grant our motions.

Dated: November 30, 1956.

Respectfully submitted,

F. T. Searls
John C. Morrissey
Robert E. May
Attorneys for
Pacific Gas and Electric Company

[3072]

Federal Power Commission
Washington 25

Pacific Gas and Electric Company
Sierra Pacific Power Company
Docket Nos. E-6482 - E-6697

California Oregon Power Company
Medford, Oregon

Gentlemen:

The Commission's staff is currently examining the respective contentions and showings in support thereof, which Pacific Gas and Electric Company and Sierra Pacific Power Company have advanced in two matters currently pending before the Commission, involving issues concerning which you are probably informed. The staff would therefore be glad to receive any comment or representation by your company.

Generally speaking, the two matters are the direct consequence of the action of the Supreme Court in setting aside, upon judicial review, the Commission's opinion and order of June 17, 1954, Docket No. E-6482, approving an increase in PG&E's filed rates and charges for wholesale electric power and energy service to Sierra; the only firm service, other than that to your Company, for which PG&E has rates and charges on file with this Commission. In one matter, PG&E seeks a reopening of the prior Commission proceeding and further action by the Commission with respect to the increased rates and charges which the Commission unsuccessfully sought to allow to PG&E. In the other, Sierra seeks certain affirmative relief against alleged unlawful actions of PG&E.

In the event that you are not already familiar with the several contentions of the two companies and the respective showings in support thereof, there are enclosed herewith (1) a copy of the Commission's order issued September 7, 1956, Docket Nos. E-6482 and E-6697, as extended time-wise by the attached Notices of Extension, and (2) two submittals of PG&E tendered on October 15, 1956, and December 3, 1956, and two by Sierra tendered November 15, 1956 and December 10, 1956.

As may be seen from Paragraph (A) of the enclosed copy of the Commission's order which consolidated the two matters and prescribed certain procedural steps, specific provision was not made for either the December 3, 1956 submittal by PG&E or the December 10, 1956 submittal by Sierra, which fact acccounts for the respective motions accompanying these latter filings. These motions are also currently pending before the Commission.

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Substantively, your particular attention is directed to the portions of the enclosed materials relating to PG&E's contention that undue discrimination, as prescribed by Section 205 of the Federal Power Act, results from its continued service to Sierra at the rates and charges embodied in its (PG&E's) Rate Schedule FPC No. 3 (the rates and charges which PG&E would have been permitted to increase by the prior action of the Commission which was set aside by the Courts). The gravamen of that contention being that you or your electric customers are adversely affected, it would be helpful to the staff in presenting this matter to the Commission, if the Commission could be apprised of the existence of any such adverse effects and the extent thereof. The foregoing is, of course, not to be construed as limiting in any way the comments which are hereby solicited.

Since staff consideration of these matters is currently in progress, the orderly conduct of Commission affairs makes it desirable that any comments you may wish to make be made known to the Commission on or before January 28, 1957, if possible.

Very truly yours,

LEON M. FUQUAY
Secretary

Inclosure No. 58134
CC: Public Utilities Commission of Oregon
Pacific Gas and Electric Company
Sierra Pacific Power Company

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Federal Power Commission
Washington 25

Pacific Gas and Electric Company
Sierra Pacific Power Company
Docket Nos. E-6482 and E-6697

Mr. Charles Weltzel
Public Utilities Commissioner of Oregon
Salem, Oregon

Dear Mr. Weltzel:

There is transmitted herewith copy of a letter to the California Oregon Power Company, which is generally self-explanatory. As may be seen, the purpose of that letter is to afford the company opportunity to comment on the matters currently pending before this Commission in the dockets enumerated above. This is to afford you a similar opportunity for the expression of any comments or representations within your interests.

There is also transmitted herewith a duplicate set of the enclosures to the California Oregon Power Company, as referred to in the enclosed copy of letter.

It would be helpful if any comments or representations you may wish to make were made known to the Commission on or before January 28, 1957, if possible.

Very truly yours,

Leon M. Fuquay
Secretary

[3075]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Frederick Stueck, Acting Chairman; Seaborn L. Digby, William R. Connole and Arthur Kline.

In the Matters of PACIFIC GAS AND ELECTRIC COMPANY SIERRA PACIFIC POWER COMPANY	Docket No. E-6482 Docket No. E-6697

ORDER GRANTING PROCEDURAL MOTIONS, DENYING MOTIONS FOR REOPENING RECORD AND FURTHER PROCEEDINGS, AND DIRECTING COMPLIANCE WITH THE FEDERAL POWER ACT

(Issued July 10, 1957)

In these consolidated dockets we have now to consider (1) renewed efforts by the Pacific Gas and Electric Company (PG&E) to obtain the increased rate for its wholesale electric power and energy service to the Sierra Pacific Power Company (Sierra) which our order of June 17, 1954,[1] would have allowed, if it had not been set aside by the courts;[2] and (2) efforts by Sierra to enforce the lower rate, embodied in a contract between the two companies.

One matter arises from two currently pending motions which were filed by PG&E on June 11, 1956, and October 15, 1956, Docket No. E-6482, for (1) a reopening of the prior rate proceeding before the Commission, conducted pursuant to Section 205 of the Federal Power Act, with opportunity on the part of PG&E to adduce additional evidence and to present further argument to the Commission; and (2) further Commission action amplifying and supplementing its former findings so as to establish PG&E's "right" to collect and retain the higher rates[3] from and after June 17, 1954, the date of issuance of Commission Opinion No. 270. The other matter arises from a currently pending formal complaint by Sierra filed July 23, 1956, Docket No. E-6697, wherein it seeks an order of the Commission directing PG&E to cease and desist from demanding of Sierra charges in excess of those computed according to the rates

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[1] *In the Matter of Pacific Gas and Electric Company,* 7 PUR 3d 256, Op. No. 270, Docket No. E-6482.

[2] *Sierra Pacific Power Co. v. F.P.C.* 223 F.2d 605, affirmed 350 U.S. 348.

[3076]

embodied in // PG&E's March 4, 1948 contract with Sierra[4] which rates Sierra alleges are now lawfully on file with this Commission.

PG&E advances two principal contentions. First, it argues independently of the Supreme Court's decision, that the rates embodied in its March 4, 1948 contract with Sierra are not rates contractually fixed for a specific term of years and, hence, can be changed in the manner previously followed by PG&E.[5] Upon the requested reopening of the Commission proceeding, PG&E seeks a formal Commission determination to that effect, contending that such a finding would reflect the intention and understanding of the parties, and when considered with the Commission's prior determinations as to the reasonable and non-discriminatory and non-preferential character of the increased rates and the unreasonableness of the 1948 rates, would establish PG&E's rights, equitable and/or legal, to the increased rates from and after June 17, 1954, the date of issuance of Opinion No. 270.

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[3] Designated in the files of the Commission as Supplement No. 1 to PG&E's Rate Schedule FPC No. 3.

[4] Designated in the files of the Commission as PG&E's Rate Schedule FPC No. 3.

[5] Through the filing, pursuant to Section 205 (d) of the Federal Power Act, of a change in the rates and charges on file with this Commission subject to a determination by the Commission of the lawfulness of the proffered rates and charges.

Alternatively PG&E argues, addressing itself to the Supreme Court's decision, that the 1948 rates adversely affect the public interest because they impair PG&E's financial ability to continue service as a public utility; are excessively burdensome upon other of its electric utility customers; and are unduly discriminatory. This condition is said to have existed on and prior to June 17, 1954, and to have continued uninterrupted to the present time. And, it is further contended by PG&E, that the increased rates previously approved by the Commission, were, on June 17, 1954, and have continued to be, not in excess of a just and reasonable rate for PG&E's wholesale power and energy service to Sierra. Upon the requested reopening of the Commission proceeding, PG&E seeks formal determinations by the Commission in regard to both of these latter contentions.

The facts upon which PG&E relies as establishing the alleged adverse effects of the 1948 rates consist, chiefly, of two revenue "deficiency" studies[6] and a comparison of the level of the 1948 rates with those of PG&E's other rates on file with this Commission and certain of PG&E's rates and charges for wholesale electric power and energy service on file with the Public Utilities Commission of California.

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[6] One on an "average" cost basis and the other on an "out-of-pocket" cost basis.

The complaint by Sierra is predicated upon an interpretation of the Supreme Court's decision in this matter as disposing of any question as to the parties' contractual obligation under the March 4, 1948, agreement with respect to rates and charges. That obligation is said to be a definite and specific rate fixed for a definite and specific term. Additionally, Sierra disputes that the 1948 rates have been shown to impair PG&E's financial ability to continue service as a public utility; to be excessively burdensome upon other of PG&E's electric utility customers; or to be unduly discriminatory.

The consolidation of these two proceedings was effected by order of the Commission issued September 7, 1956. That order also granted a request by PG&E for leave to file a showing of facts and statement of argument in support of its requested reopening of the prior Commission proceeding and for further action by the Commission in respect to the increased rates to Sierra, as an alternative to the granting of such reopening and further Commission proceedings. In doing so the Commission directed PG&E to "show in what particulars, if any, the aforementioned 1948 contractual rates and charges were, prior to, on and after June 17, 1954, or presently are so low, after giving proper effect to any benefits accruing to PG&E through the retention of its Sierra's business, as to adversely affect the public interest by impairing its financial ability to continue service as a public utility, by casting an excessive burden upon any other of its electric utility customers, by being unduly discriminatory with respect to any other of its electric utility customers, or in any other way being adverse to the public interest within the meaning of the aforementioned opinion of the Supreme Court." Sierra was granted similar leave, by that order, to support its contentions in this matter with further factual and legal showing in response to PG&E.

PG&E, on October 15, 1956, and Sierra, on November 15, 1956, filed their respective showings of fact and statement of argument.[7] Subsequently, PG&E, on December 3, 1956, and Sierra, on December 10, 1956, moved that they be permitted to file a further statement in the nature of a closing reply. Such further statements were tendered with those motions which are currently pending before the Commission.

Our consideration of these matters, including the aforementioned submissions of PG&E and Sierra, leads us to

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the conclusion that no useful // purpose would be served by a reopening of Docket No. E-6482 and further Commission proceedings therein; the requested reopening and further Commission proceedings being a matter committed to the discretion of the Commission by Section 206 of the Act, the provisions of which would (under our interpretation of the Supreme Court's decision in this matter) govern any such reopening and further action by the Commission. Accordingly, we believe that PG&E.'s motions for a reopening of the prior rate proceeding before the Commission and further Commission action in amplifying and supplementing its findings as set forth in Opinion No. 270, should be denied and PG&E should be directed to cease and desist from demanding, for its wholesale electric power and energy service to Sierra, rates and charges different from those now lawfully on file with this Commission for that service, PG&E's Rate Schedule FPC No. 3. The reasons which impel us to these judgments and the factual and legal bases therefor are as follows.

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[7] The time requirements of the Commission's order issued September 7, 1956, that PG&E tender any further showing or statement within thirty days from the issuance thereof, and that Sierra tender any further showing or statement within twenty days thereafter, were subsequently extended to the above dates.

First, in our view the Supreme Court's decision in this matter must be taken as disposing of PG&E's contention concerning the contractual obligation of the parties under the 1948 contract with respect to rates. That this obligation is one involving a definite and specific rate fixed for a definite and specific term unless otherwise changed by mutual agreement of PG&E and Sierra or by action of the Commission taken in accordance with the Federal Power Act is, we think, abundantly clear from the language of the Court: in describing the proceeding as one involving "a 15-year contract for power at a special low rate"; in applying the rationale of *United Gas Pipe Line Co. v. Mobile Gas Service Corp.,* 350 U.S. 332, to the Federal Power Act by construing the Federal Power Act as the Natural Gas Act "as not authorizing unilateral contract changes" and concluding that "neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra"; and in construing the statutory standard of unlawfulness, in this context, as requiring a determination of an adverse effect of the 1948 contract rate on the public interest "as where it might impair the financial ability of * * * [PG&E] to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[8]

Accordingly, we believe that no useful purpose would be served by any further proceedings before the Commission on this subject.

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[8] 350 U.S. 348, 352 *et seq.*

Secondly, under the Supreme Court's distinction on the facts of this case between Commission-prescribed rates and contract rates, the factual bases which PG&E adduces in support of the alleged adverse effects of the 1948 rates upon the public interest do not appear to be of a nature which would compel or warrant further examination or investiga-

tion by the // Commission at this time. As we interpret that decision, the relevance of revenue deficiency studies of the type proffered by PG&E in support of its current allegations would seem to be only with regard to establishing the subsidiary fact that the cost of rendering the Sierra service exceeds revenues therefrom which may or may not impair PG&E's financial ability to continue service as a public utility, cast an excessive burden upon other of PG&E's electric utility customers, be unduly discriminatory, or otherwise adversely affect interests of public concern; the *ultimate fact* to be ascertained. On their face, those studies show no more than that the Sierra business is somewhat less profitable to PG&E at the present time than at the time of the prior Commission proceedings.

Thus, for example, PG&E asserts that because of the low revenues under the 1948 rates its overall cost of money has been and will be further increased. Its underlying argument is that any reduction in earnings available for bond interest and preferred and common stock dividends will affect investor appraisals; resulting first in a rise in capital costs and finally in an inability to secure money at any price. However, PG&E does not offer nor does it propose to offer any support for this allegation through presentation of testimony with respect to future increases in its cost of money or tending to show that its cost of money has actually been increased in the past due to its low earnings under the 1948 contract.

PG&E also contends that those low earnings unduly burden other of its electric utility customers through direct subsidization by such other customers; payment by all of PG&E's electric utility customers of higher money costs applicable to its utility business as a whole; and utilizing other portions of PG&E's electric utility business to furnish the credit for capital requirements associated with its Sierra business.

However, in regard to the first mentioned "burden" on other customers, PG&E does not seek to show that the low return which it derives from the Sierra business is offset by excessive returns from other sales by PG&E subject to the regulatory jurisdiction of the Public Utilities Commission of California or of this Commission.

The absence of what seems to us to be relevant factual support in respect to the second "burden" on other customers of PG&E has already been indicated. In regard to the third "burden" on other customers, PG&E does not seek to adduce testimony as to the propriety or necessity of raising new capital for segments of its business, (i.e., the Sierra business on the one hand and all of the rest of PG&E's business on the other), viewed in isolation, on the individual strength thereof; or to show that it has carried on such a practice in the past. Nor does PG&E offer to show any cur-

[3080]

rently imposed or expected restrictions by its // equity holders or bondholders respecting the use of the proceeds of PG&E's outstanding or proposed security issues to any such segment of its electric utility business.

In support of its allegation of undue discrimination by reason of the 1948 rates, PG&E cites the extant differentials between the level of those rates and certain other rates and charges of PG&E on file with this Commission for wholesale electric power and energy service to the California Oregon Power Company and certain others on file with the Public Utilities Commission of California for generally comparable service. However, PG&E does not seek to show that such other customers, by reason of the cited differentials, bear a disproportionate share of PG&E's total costs of service. Nor does PG&E seek to adduce evidence that other parts of its interstate or intrastate resale business served at higher rates than the 1948 rates to Sierra are placed at any competitive economic or other disadvantages thereby.[9]

Accordingly, we believe that no useful purpose would be served by any further proceedings before the Commission at this time, as requested by PG&E, with respect to past or current adverse effects of the 1948 rates upon the public interest.

What we have said herein, in suggesting the nature of the factual support which we regard as a part of the necessary bases for PG&E's current allegations must be considered in the light of the particular contentions which PG&E makes. Certainly, our remarks are not to be construed as indicating what we would regard to be relevant in all or any other situations, involving other contentions and arising from different circumstances.

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[9] The Public Utilities Commission of California, by letter dated August 30, 1956, Docket No. E-6697, indicated generally that it had no comments or suggestions to make in regard to the above matters. The Public Service Commission of Nevada, by letter dated August 10, 1956, Docket No. E-6697, indicated that it regards the Supreme Court decision in this case as being dispositive of the matters currently pending before this Commission. By letter of this Commission dated January 11, 1957, The Public Utilities Commissioner of Oregon was afforded the opportunity to comment or make representations in regard to the above matters. To date no reply has been received. Also, to date, the Commission has not received any complaints or protests by any resale customers of PG&E other than Sierra or by any ultimate consumers served by PG&E or others.

[3081]

Our consideration of the above entitled matters has included the submissions by PG&E and Sierra on December 3 and 10, 1956, respectively, as referred to above. Accordingly, it is necessary and appropriate for the purposes of the Federal Power Act that the aforementioned motions of PG&E and Sierra, filed on December 3 and 10, 1956, respectively, be granted as hereinafter ordered. It is also necessary and appropriate for the purposes of the Federal Power Act that (1) PG&E's motions filed June 11, 1956, and October 15, 1956, as referred to above, be denied and the proceedings thereon terminated, (2) that PG&E be directed to cease and desist from billing or demanding from Sierra, rates and charges other than those duly filed by PG&E with this Commission for its wholesale electric power and energy service to Sierra, PG&E's Rate Schedule FPC No. 3, and (3) that Sierra's formal complaint filed July 23, 1956, as referred to above, be dismissed, and the proceeding thereon terminated, all as hereinafter ordered.

Wherefore it is ordered:

(A) The respective motions of PG&E and Sierra filed December 3 and 10, 1956, as referred to above, be and they hereby are granted.

(B) The motions of PG&E filed June 11, 1956, and October 15, 1956, as referred to above, be and they hereby are denied and the proceeding thereon terminated.

(C) PG&E, be and it hereby is directed to cease and desist from billing or demanding from Sierra (for the wholesale electric power and energy service described above), charges computed at rates other than those embodied in

PG&E's Rate Schedule FPC No. 3 or at such other rates therefor as hereafter may be lawfully established pursuant to the provisions of the Federal Power Act.

(D) The formal complaint filed by Sierra on July 23, 1956, as referred to above, be and it hereby is dismissed and the proceeding thereon terminated.

By the Commission.

J. H. GUTRIDE
JOSEPH H. GUTRIDE
Secretary.

[3082]

WESTERN UNION [TELEGRAM]

July 29, 1957

J. H. Gutride, Secretary
Jerome K. Kuykendall,
Frederick Stueck
Seaborn L. Digby,
William R. Connole
Arthur Kline

Federal Power Commission
General Accounting Office Building
441 G Street, N.W.
Washington, D. C.

Pacific Gas and Electric Company respectfully and urgently requests that Commission, on or before July 31, stay order issued July 10 in Dockets E6482 and E6697 until disposition of Pacific's forthcoming application for rehearing on said order. Failure to obtain stay by normal billing date July 31 will require billing Sierra Pacific Power Company in reduced amount at new legal rate and thereby foreclose Pacific from ever recovering, for period covered by such billing, rate which Pacific claims it is entitled to under the law and the contract and which may ultimately prevail if Commission rehears case on basis of forthcoming application or on basis of court review of case should application for rehearing be denied.

Pacific is now preparing motion for rehearing, together with detailed points and authorities, which it believes will clearly demonstrate error of July 10 order in concluding that Supreme Court decision prevents Commission from inquiring into disputed factual circumstances which give meaning to 1948 contract and show it to be contract for changeable rate. Pacific most earnestly believes that if such factual inquiry is made Commission will conclude that contract is not for fixed rate and that accordingly Pacific will not be required to cease and desist from billing Sierra at rate this Commission has already found to be just and reasonable. It is therefore most important that stay be granted as requested herein.

Formal filing of application for stay and application for rehearing of Commission's July 10 order will follow on or about August 9.

Delay in requesting stay has been due to fact that counsel handling this matter has been on vacation and returned only today.

F. T. SEARLS, General Attorney
Pacific Gas and Electric Company
245 Market Street
San Francisco 6, California

[3087]

WESTERN UNION TELEGRAM

1957 Jul 31 PM 1 37

Pacific Gas and Electric Co.
245 Market St., S Fran.

The Commission has considered your telegraphic request received July 30 for stay of its order of July 10 in the matters of Pacific Gas and Electric Co. Docket No. E-6482 and Sierra Pacific Power Co. Docket No. E-6697; also the telegraphic response thereto received July 31 from Sierra Pacific. The Commission finds no sufficient showing has been made of probable ground for anticipating that any facts or legal considerations will be adduced by or pursuant to your contemplated petition for rehearing of such nature as to make it either appropriate to carry out the provisions of the Federal Power Act or in the public interest to grant the requested stay. Accordingly the request is hereby denied. By direction of the Commission.

Joseph H. Gutride, Secretary
Federal Power Commission

[3094]

UNITED STATES OF AMERICA
Before the
FEDERAL POWER COMMISSION
WASHINGTON, D. C.

In the Matters of PACIFIC GAS AND ELECTRIC COMPANY SIERRA PACIFIC POWER COMPANY	Docket No. E-6482 Docket No. E-6697

Application for Rehearing, Stay of Order, Oral Argument on Application for Rehearing, and Other Relief.

* * * * * * *

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Exhibit A

Affidavit of N. R. Sutherland, President of Pacific Gas and Electric Company

[3097]

APPLICATION FOR REHEARING, STAY OF ORDER, ORAL ARGUMENT ON APPLICATION FOR REHEARING, AND OTHER RELIEF.

Comes now Pacific Gas and Electric Company, hereinafter referred to as "Pacific", the applicant in Docket No. E-6482, and pursuant to Section 313(a) of the Federal Power Act (16 U.S. Code 825(1)) and Section 1.34 of the Rules of Practice and Procedure of the Federal Power Commission, hereinafter referred to as "Commission", states that it is aggrieved by the Commission's order issued July 10, 1957, in the above-captioned consolidated dockets, and therefore makes this application for rehearing, stay of order, oral argument on application for rehearing, and other relief, and states further the following grounds on which such application is based:

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1. The Commission erred in not ordering a // hearing so that it could make a finding on the specific meaning of the 1948 contract between Pacific and Sierra.

2. The Commission erred in holding that the Supreme Court in *Sierra Pacific Power Company v. F.P.C.*, 350 U.S. 348, held that the 1948 contract involved a definite and specific rate fixed for a definite and specific term.

3. The Commission erred in ignoring both Pacific's and Sierra's interpretation of the contract because *under either view of the contract Pacific is entitled to a change in the rate.* Under Pacific's view it is entitled to a rate change in the same manner as its P-31 rate on file with the California Public Utilities Commission. Under Sierra's view, Pacific is entitled to a rate change if it did not earn more under the contract than it would save if Sierra's business were

lost or abandoned or if it did not return incremental or out-of-pocket costs. Under either view Pacific is entitled to an increase in the rate *as a matter of a contractual right.*

4. The Commission erred in not granting a hearing to determine whether the Sierra rate is adverse to the public interest.

[3099]

Due to the close relationship of the arguments // in support of the first 3 points of error it has been more convenient to treat them together rather than independently, discussing each under separate headings. They are discussed in Part I hereof. However, the 4th point of error is separately considered as Part II.

Part I

A. Introduction to Points and Authorities.

It has been Pacific's consistent position since the commencement of proceedings in Docket No. E-6482 that the 1948 contract between it and Sierra Pacific Power Company was understood by the parties to escalate upward and downward concurrently with the upward or downward escalations of Pacific's P-31 resale rate schedule on file with the California Public Utilities Commission. This basic contention of Pacific was before the Commission when it rendered its Opinion No. 270. In this opinion the Commission, apparently for the sole purpose of "making law" as to its powers over contracts subject to its jurisdiction, avoided a determination of the basic question of the interpretation of the contract, which was presented by Pacific. Instead, the Commission assumed for the purpose of its decision that the contract was for a fixed rate and held that the Commission had the power to increase a fixed rate upon application by

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Pacific. This was not at all in // accordance with Pacific's application, which was an application under Section 205(d) of the Federal Power Act for a rate increase under a changeable rate contract.

The Commission did not then, and has not to date, attempted to determine the true nature of the 1948 contract. The Commission occupies the position and the status of a Court of first resort in respect to contracts of utilities under its jurisdiction. The Commission is therefore the forum in which questions of fact must first be determined. The Commission, by an inexcusable silence, has evaded its obligation to render a finding on this critical question of fact. And instead of now determining the question of fact that has been before it since 1953, the Commission seeks to justify its evasion of its statutory duty by saying that the Supreme Court has made the decision for it. The very nature and purpose of appellate review and practice prove the Commission is in error.

Furthermore, and conclusively, there was never a finding on this issue by the Commission for the court to accept or reject. The Supreme Court thus necessarily had to decide the case as though the contract provided for a fixed rate.

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Obviously the Court took this approach // because the Federal Power Commission decided the case on this basis. That is, the Commission assumed for the purposes of its decision that the contract was for a fixed rate. The Commission's decision was made on the pure legal basis that, assuming the contract as one for a fixed rate as Sierra contended, the rate could nevertheless be changed if it failed to meet the usual standards. In short, the Commission held that insofar as it was concerned it made no difference whether the contract was intended to provide for a changeable or a fixed rate because the Commission concluded that it had the power and the obligation to apply the same standard in the determination of the reasonableness of the rates to both types of contracts.

The Supreme Court merely followed along with the same basic assumption as to the nature of the contract in order to reach the point of law decided by the Commission.

In view of the Supreme Court's opinion that it does make a difference whether the contract is for a fixed or a changeable rate, the Commission can no longer ignore the question as to the meaning of the contract. Whereas previously the Commission could take the position that the meaning of the contract was immaterial, the Supreme Court's decision makes it clear that it is material. The critical question

[3102]

which now looms in this case is the one which the // Commission originally considered immaterial and left undecided in its opinion—the true meaning of the contract. The question, therefore, legally and in good conscience can no longer be avoided.

It certainly cannot be avoided by saying that the Supreme Court decided the question for the Commission, for it is obvious that all the court did was review the only decision that was ever made by the Commission in this case—that the Commission could change a rate by its usual method regardless of whether the rate were a fixed or a changeable rate provided by contract. The Commission was originally in error in considering that the question as to the meaning of the contract was immaterial and therefore did not have to be decided. The Supreme Court has shown that this question—the one Pacific has long asked the Commission to decide—is the determinative issue in this case.

It must be very clear to the Commission that Pacific believes most sincerely that it has been treated with great injustice by the Commission in this instance. It must also be very clear to the Commission, on the basis of Pacific's consistent position that the contract in question is not for a fixed rate for a definite term, that Pacific's management

sincerely believes that the contract // is not of that nature. We wonder: *Does the Commission think for a moment that Pacific would be trying to change Sierra's rate as it has been seeking if Sierra and Pacific had agreed that the rate would not be subject to change?*

There is in the files of the Commission the sworn statements of the President of Pacific Gas and Electric Company, Mr. N. R. Sutherland, who personally negotiated the contract with Mr. Frank Tracy, President of Sierra Pacific Power Company. Mr. Sutherland states, in no uncertain terms, that on several occasions he and Mr. Tracy expressed complete and mutual understanding that the rate provided in the contract would escalate upward and downward with Pacific's P-31 resale rate on file with the California Public Utilities Commission.[1] These statements have never been directly denied by Sierra![2] Instead, Sierra has merely

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[1] These sworn statements of Mr. Sutherland appear on pp. 4-5 of Pacific's Supplemental Motion herein, dated October 10, 1956, and pp. 3 and 5 of Pacific's Submission, dated October 13, 1956. To bring together these sworn statements in one place, and to eliminate any possible question as to the nature of the testimony proffered by the Supplemental Motion, we attach hereto as Exhibit A, an affidavit by Mr. Sutherland setting forth in some detail the additional evidence he will present in support of the sworn statements we refer to.

[2] See Mr. Tracy's evasive affidavit of November 7, 1956, in Sierra's reply dated November 14, 1956.

[3104]

maintained that the // evidence *is not admissible.* As will be conclusively shown later, this evidence is fully admissible to interpret the meaning of a contract which must be determined from the intentions of the parties. These intentions are best, and necessarily must be, discovered from an examination of the surrounding circumstances and negotiations.

The facts, if inquired into, will clearly demonstrate that the contract means what Pacific has been contending from the outset. Pacific, however, is not at this time attempting to convince the Commission that it is right; this will follow later. Pacific is only asking for a HEARING! Yet, to date, it has not been heard and its evidence has not even been weighed by the Commission (nor by either of the courts which reviewed the Commission's ruling of law). Upon a proper hearing the evidence will clearly demonstrate beyond any question of doubt that the contract was not a "fixed" rate contract.

[3105]

In addition to the foregoing, Pacific respectfully submits that the Commission has either overlooked or completely misinterpreted one vital aspect of Pacific's submission in respect to the showing that the Sierra rate does not compensate Pacific for its avoidable out-of-pocket costs.

Sierra claims that it understood that Pacific was entitled to a change in the rate provided in the contract if it did not earn "more under the contract than it would save if Sierra's business were lost or abandoned"[1] or if it did not return incremental or out-of-pocket costs.[2]

Pacific has requested an opportunity to show that it is entitled to an increase under *Sierra's own interpretation of the* contract, because the Sierra rate does not cover "avoidable or out-of-pocket costs."

It is utterly inconceivable that the Commission can deny Pacific a hearing on the true meaning of the contract and on the issue of whether the contract rate covers avoidable or out-of-pocket costs. For even if Sierra's interpretation of the contract prevails, the Commission must then determine whether the existing rate // complies with the contract standard—whether Pacific is recovering its avoidable or out-of-pocket costs of service.

[3106]

We wish to emphasize that Pacific has not placed itself in the situation with which it is now confronted. It is entirely the result of the Commission's failure to make the original factual determination as to the intention of the parties to the 1948 contract.

It will be a flagrant disregard of any concept of fair hearing if the Commission now continues to avoid the question of the meaning of the contract. Legally and morally it must decide this question. The question can not be avoided by saying that the Supreme Court's opinion has precluded its consideration, when in fact all the court did was decide the case as though it involved a fixed rate contract because that was the original basis on which this Commission decided this case. The Commission is still free to decide the case on its true merits, that is, on the basis of determining the real intention of the parties when they entered into the contract in question.

Until a decision on the merits of this question as to the correct meaning of the contract is rendered, Pacific will not have had its "day before the Commission" nor its "day

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1. Sierra's Opening Brief before the Commission, p. 63.
2. Tr. pp. 982, 987.

[3107]

in court" on the argument it has consistently // been making ever since the case started.

There is no reason, legally or in good conscience, why the Commission should not at this time afford Pacific its day in court. The rules of law governing the doctrine of the "law of the case" after an appellate review do not preclude a lower tribunal from reaching and deciding issues which it did not reach and decide originally and which, therefore, were not reviewed on appeal. Such is exactly the situation here. Perhaps an abstract illustration will make the point clear:

> Plaintiff sues defendant. Defendant has defense A and defense B. He argues both. The trial court is persuaded by defense B and considers it unnecessary to rule on defense A. It, therefore, gives judgment for defendant holding that defense B is good and making no holding as to defense A. Plaintiff appeals. The reviewing court reverses, holding that defense B is invalid. Does the reversal mean that defense A is bad? Of course not. On remand, the lower court is entirely free to hear and decide defense A.

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There is no difference between our case here and the abstract one we have put. Not only legally, but in good moral conscience as well, we should not be shut out from our defense A, the one we urged originally and the one which the Commission—erroneously, as it turns out—did not consider.

The Commission is clearly in error in thinking that the appeal to the Supreme Court has shut out the Commission from considering and deciding the basic issue in this case

—the true meaning of the 1948 contract.

In all of this, we are guided by the principle that "the law will do what is fair." There is nothing fair whatever about shutting Pacific out from a hearing on the question it has been arguing since this case began. The time has come to hear the question.

B. Points and Authorities

1. The Commission Is Not Precluded from Determining the True Nature of the Contract.

The Supreme Court, in *Sierra Pacific Power v. Federal Power Commission,* 350 U.S. 348, 355 (1956) remanded "the case to the Federal Power Commission for such further proceedings not inconsistent with this opinion, as the Commission may deem desirable." This in the words of the Supreme Court "means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law."[1]

(a) On remand, the Commission has the power to make findings on questions of fact which became material by the appellate court's conclusions of law.

It is well recognized "hornbook" law that administrative bodies, being creatures of the legislature and conducting legislative functions in fields where their expert knowledge is essential, have greater latitude on remand than do the trial courts of the judicial system. However, even if the administrative bodies had the more restricted powers of trial courts they would nevertheless have complete power to determine the questions of fact not theretofore determined which become material in view of the appellate court's legal conclusions. On remand the lower court is free to reexamine the entire case, especially the // facts, in the light of the law enunciated by the appellate court. Such reexamination may well reveal a factual defense or claim which was not considered previously because of the lower court's erroneous view of the law.

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[1] Ford Motor Co. v. Labor Board, 305 U.S. 364, 374 (1938).

The Supreme Court has made this rule of appellate procedure abundantly clear. In *Mutual Life Ins. Co. v. Hill,* 193 U.S. 551, 553, the Court said:

> "When a case is presented to an appellate court it is not obligated to consider and decide all the questions then suggested or which may be supposed likely to arise in the future progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an *affirmance* of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion —yet *no such conclusion follows in case of a reversal.* It is impossible to fortell what shape the second trial may take or what questions may then be presented. *Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.* (Emphasis ours)

Moreover, as has been mentioned, administrative agencies enjoy even greater power and greater flexibility of action than do trial courts. In the instant situation the Commission considered a case involving several issues. It decided the case on the basis of merely one of those issues, and it was judicially reversed on that one issue. The agency's

[3111]

broad power in this situation is well outlined // in Davis on Administrative Law (pp. 611-612):

> [W]hen an agency considers a record involving many issues, decides the case on one ground, and then is met with judicial rebuff on that ground—is the agency then barred from reconsidering the whole case on a new record and deciding on other grounds? This is the generalized statement of the problem of the Pottsville case, holding that the agency is free to reconsider the whole case on a new record. The Court laid down the broad proposition that 'an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.' "

In *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134 (1940), referred to in the above quotation, the Supreme Court adopted the philosophy that in reviewing actions of an administrative agency the appellate court does not act the same as it does when it reviews a lower court decision. According to the court, the "differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of the courts."

Following the philosophy of the *Pottsville* case the Court, in F.P.C. v. Idaho Power Co., 344 U.S. 17, 20 (1952), said:

> "But the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration."

[3112]

In *Ford Motor Co. v. Labor Board,* 305 U.S. 364, 374 (1938), the court said:

> "The 'remand' does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law. See *Federal Radio Comm'n v. Nelson Brothers Co.,* 289 U.S. 266, 278.
>
> "Such a remand does not dismiss or terminate the administrative proceeding. If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard. . . . If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken.

The Pottsville doctrine is particularly applicable to the case now before the Commission. Pacific has yet to have a decision on the merits on the issue of whether the contract contemplated a fixed or changeable rate. The fact that the Federal Power Commission committed legal error in its first disposition of the case certainly cannot be said to now have divested Pacific of its right to its hearing on the merits. As the Supreme Court has pointed out in *Securities Comm'n v. Chenery Corp.,* 332 U.S. 194, 200 (1947):

> "After remand was made, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress."

So too is the Commission now bound to deal with the problem afresh and perform the function delegated to it by

[3113]

Congress. The prior proceedings in this case have // produced but a single limitation on the Commission's powers.

It can no longer modify a contract for a *fixed* rate unless it finds the contract rate to be "so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." Its powers over *changeable* rate contracts is not affected by this decision.

There is still another reason why the *Pottsville* doctrine has application here. Administrative agencies are particularly equipped to decide intricate and technical questions because of the skills of the administrative specialists. As the Supreme Court has on recent occasion said:

> "Where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that 'the enquiry is essentially one of fact and of discretion in technical matters,' then the issue of tariff-application must first go to the Commission. The reason is plainly set forth: such a 'determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.' "[1]

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[1] United States v. Western Pacific Ry., 352 U.S. 59 (Dec. 1956).

The issue now before the Commission is the construction

[3114]

of a Commission tariff schedule, a filed contract // between two public utilities, which was negotiated in a background of acquaintance with many intricate facts of the utility business—among them the general attitude that rates, otherwise unqualified in a contract, were subject to change with cost changes and also the specific background in this case of repeated acknowledgments made by the parties as to the significance they attached to the fact that the rate they were placing in the contract was known by them to be a changeable one—i.e., the P-31 rate on file as a general tariff with the California Public Utilities Commission and subject to change.[1] Undoubtedly, the Commission is the most qualified and expert body to determine from the four corners of the contract and the extrinsic circumstances the real meaning of this contract negotiated in such a background.

Under the *Pottsville* doctrine there is no doubt that the Commission has the power to consider on remand the matter of the contract between Sierra and Pacific.

(b) The rule of "law of the case" does not bar the Commission in the present instance.

Sierra has relied extensively on the doctrine of law of the case in its submission to the Commission and it is evident that the Commission has accepted this argument. As has been indicated by the discussion of the *Pottsville*

doctrine, the doctrine of law of the case has but limited application to administrative bodies. But even if it were fully applicable, it is clear that the rule would not bar the Commission in the present instance from considering the question as to the meaning of the contract.

The law of the case of course applies to questions of law decided on appeal. But it applies *only* to questions of law. A decision on a question of fact does not become law of the case, "nor stop the parties on second trial from showing the true state of the facts."[1] As one court has said, "it is settled beyond controversy that a decision of this court on appeal as to a question of fact does not become law of the case."[2] The reason for this limitation is clear:

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[1] See p. 7 above, footnote 1, p. 7 above, and Exhibit A attached hereto.

> "Facts are stated, in the opinion of the Court, solely that the course of reasoning adopted by the Court, and the principles enunciated, may be the better understood. The Court does not assume to find the facts in a case, for it has no authority to do so, except in case where an ultimate fact results, as a conclusion of law, from the proof of certain prior facts. If this Court states the evidence in a cause, whether correctly or incorrectly, the statement in no manner controls the

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1. 5 C.J.S., Appeal & Error, § 1834, p. 1288.
2. Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200 (1895).

> Court below, // and cannot prejudice the parties, where a new trial is had. It is upon questions of law that the decision of the appellate Court becomes the law of the case, and not upon questions of fact."[1]

It is especially clear that the law of the case has no application to facts when, as in our case here, a remand is involved. As we have indicated earlier, remand means the appellate court is permitting further proceedings in the

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1. Sneed v. Osborn, 25 Cal. 619, 629 (1864);

Accord:

Millsap v. Balfour, 158 Cal. 711, 714, 112 Pac. 750 (1910):
("It is not the law of the case except in so far as the facts are the same.")

Madsen v. LeClair, 125 Cal. App. 393, 398, 13 P.2d 939 (1932):
("Where the appellate court has, in its opinion, stated a rule or principle of law necessary to a decision, that rule or principle must be adhered to and observed throughout the subsequent progress of the case, both in the lower court and upon subsequent appeals, . . . This doctrine does not, however, extend without exception to questions of fact. . . . the doctrine of law of the case is rarely, and in a very limited

class of cases, applied to matters of evidence as distinguished from rulings of law.")

Estate of Baird, 193 Cal. 225, 223 Pac. 974 (1924);
Cowell v. Snyder, 171 Cal. 291, 152 Pac. 920 (1915);
Moore v. Trott, 162 Cal. 268, 122 Pac. 462 (1912);
Allen v. Bryant, 155 Cal. 256, 100 Pac. 704 (1909);
Wallace v. Sisson, 114 Cal. 42, 40 Pac. 1000 (1896).

[3117]

matter. If the fact statement of an opinion were // deemed to be conclusive on the second trial, the outcome of the case would never change since the "law of the case" decided on appeal would have to be applied to the "facts stated."

The Supreme Court has recognized that these principles are especially applicable where an administrative tribunal is concerned. In *United States v. U. S. Smelting,* 339 U.S. 186, 198 (1950), the court said "The rule of law of the case . . . is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri.* The Commission had a right on reconsideration to make a new record. . . . When finally decided, all questions were still open and could be presented."

The above arguments conclusively show that on remand the Commission is free to consider afresh the entire case before it with the sole restriction that it must be guided by the law (not the facts) handed down by the Supreme Court. Sierra has argued that one further obstacle prevents the Commission from hearing and considering evidence concerning the true nature of the contract. This argument is based on the parol evidence rule.

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(c) Extrinsic evidence is necessary and must be heard to give this contract the meaning intended by the parties.

Sierra contends that parol evidence cannot be introduced to give meaning to the contract now before the Commission. This contention is completely without merit. As Sierra knows, the parol evidence rule only applies where there is an attempt to vary the terms of a contract. The rule does not apply where the parties are introducing evidence to INTERPRET the contract.[1]

The intention of the parties is all-important in the process of interpretation, and discovering this intention necessarily involves considering the surrounding circumstances. Thus, it is clear that "the meaning to be discovered and applied is that which each party had reason to know would be given to the words by the other party. Antecedent and surrounding factors that throw light upon this question may be proved by any kind of relevant evidence."[2]

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[1] Atlantic Northern Airlines v. Schwimmer. 96 A.2d 652 (N.J. 1953). ("The 'parol evidence rule' purports to exclude testimony 'only when it is offered for the purpose of "varying or contradicting" the terms of an "integrated" contract; it does not purport to exclude evidence offered for the purpose of interpreting and giving a meaning to those terms. The terms of any contract must be given a meaning by interpretation before it can be determined whether an attempt is being made to "vary or contradict" them.' ")

[2] 3 Corbin, Contracts, § 579, pp. 248-250.

Sierra has also contended that the plain meaning of the words cannot be varied. This contention, too, is without merit. That rule has no application where the plain meaning will not carry out the true intention of the parties. As one court has said: "Much can be said in support of the rule that parol evidence is only admissible to explain an ambiguity appearing on the face of the document; but it is also admissible to show that what appears to be a perfectly clear agreement in fact meant something different to the parties."[1]

As a noted authority on contracts has said: "It is a very commonly reported statement that words are to be given 'their plain, ordinary and popular meaning;' but this is al-

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1. Wells v. Wells, 74 Cal. App. 2d. 449; 169 P.2d 23, 27.

Sanitary Farm Dairies v. Gammel, 195 F.2d 106 (8th Cir. 1952). (Held "net earnings" really meant "net profits" reclaimed after payment of taxes, not before taxes.)

Kleinhans v. Reasor, 103 N.E. 2d 655 (Ill. App. 1952). A commission of "3 per cent on business secured"—held proof of previous negotiations and agreement showed the parties meant 3 per cent on payments actually received, not in the amount of a contract later cancelled by the government.)

[3120]

ways limited by adding some such clause as the // following: 'in the absence of relevant evidence indicating that the words were used with a different meaning.' If there is in fact a 'plain, ordinary and popular' meaning of words used by the parties, that fact is evidential that the parties used them with that meaning. It is fully overcome, however, as soon as the court is convinced that one of the parties used and understood the words in a different sense and that the other party had reason to know it."[1]

The situation between Sierra and Pacific has been aptly summed up by the same author: "The courts do not love an 'objective' theory of contract or apply it in the process of interpretation merely because it is 'objective.' They apply it only when they find in fact that one of the parties understood the words of agreement in harmony with such an interpretation and that the other party had reason to know that he did. Indeed, the court may be convinced that both parties so understood the words, and that subsequently discovered self-interest has caused one of them to assert a different meaning."[2]

It is clear that this is the situation here. Both parties several times acknowledged the rate to be changeable

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[1] 3 Corbin, Contracts, § 542, pp. 69-70.

[2] 3 Corbin, Contracts, § 539, p. 53.

[3121]

whenever the P-31 rate changed.[1] And both parties believed it was unnecessary to mention the rate was changeable because both understood the law to be that a contract was always subject to change by a utility commission. Clearly, therefore, both parties understood that the contract provided for a changeable rate. It was only in the 1953 hearings, five years after the contract was entered into, that Sierra found it to its best interest to say another meaning was intended—i.e., that the rate was a fixed one and therefore would change only if Pacific was not recovering its avoidable or out-of-pocket costs of service.

It is equally well settled that a contract must be interpreted to carry out the intention of the parties. The Arizona Supreme Court has said: "Where it is plain that a strict and literal construction of a contract does not convey the real meaning of the parties, such construction must not be entertained. . . . [W]hen the intention is sufficiently apparent, effect should be given to that intent though some violence is thereby done to the words."[2]

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[1] See footnote 1, page 7, above, and Exhibit A attached hereto.

[2] Lemons v. Knox, 232 P.2d 383, 385 (Ariz. 1951). ("Manager" held to really mean "tenant.")
See also:
Real Estate Title Insurance Company v. District of Columbia, 161 F.2d 887, 889 (CADC 1947). ("The courts will always look behind the terminology to ascertain what the parties intended in making the contract." Held: "[T]he general understanding of petitioners, the bar, and the public" was conclusive in determining the intention of the parties of the meaning of the contract.) Barnes Co. v. Folsinski, 60 N.W. 2d 302, 306 (Mich. 1953). ("The primary ques-

tion involved is one of interpretation of the contract. In construing its provisions due regard must be had to the purpose sought to be accomplished by the parties as indicated by the language used, read in the light of the attendant facts and circumstances. Such intent when ascertained must, if possible, be given effect and must prevail as against the literal meaning of expressions used in the agreement.")

[3122]

Therefore, in interpreting a contract the general rule is one of admitting evidence concerning the surrounding circumstance rather than excluding it. Only by hearing such extrinsic evidence can the trier of fact conclude what the parties really intended by the words they selected. Thus, "in determining whether the two parties gave the same meaning to their express words and what that meaning was, or in determining whether one party gave a particular meaning to the words and the other knew or had reason to know that he did, the court will need to know the preliminary negotiations and communications between the parties to the contract. These are among the relevant surrounding circumstances; and evidence of what they were is admissible."[1] And it is equally true that custom and usage of a particular place or trade can be proved to be given to the written words of a contract a meaning different from that which would be given to the words by their more general usage. This is true even though the words are ordinarily words in common use.[2]

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[1] 3 Corbin, Contracts, § 543, p. 78.

[2] 3 Corbin, Contracts, § 555.

[3123]

Applying these principles to the case now before the Commission, it is clear that the Commission must and should hear the evidence that Pacific contends will prove that the contract was one for a changeable rate. Only by hearing this evidence can the true meaning of the contract be understood. Not only is it obvious that both parties understood the law at the time the contract was entered into to mean that contract rates were always subject to change, but there are also sworn statements in the files of the Commission made by Mr. Sutherland, the President of Pacific, who personally negotiated the contract with Mr. Frank Tracy of Sierra, to the effect (a) that the parties expressly understood that the rate would be subject to change in accordance with changes in the P-31 rate,[1] and (b) Sierra expressly represented to Pacific that it fully understood that the rate was so changeable and in reliance on this Pacific executed the contract,[2] and (c) recognizing the foregoing, Sierra specifically requested Pacific to delay its application for the increase to Sierra, but only with the express understanding obtained from Sierra that at a later time an increase would be made.[3]

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[1] Submission of Pacific Gas and Electric Company, p. 3, see also footnote 1 page 7 above and Exhibit A attached hereto.

[2] Supplemental Motion of Pacific Gas and Electric Company for Reopening and Further Hearing, p. 5, see also footnote 1 page 7 above and Exhibit A attached hereto.

[3] Submission of Pacific Gas and Electric Company, p. 5, see also footnote 1 page 7 above and Exhibit A attached hereto.

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It is equally obvious that Pacific would never enter into a contract to provide for an unchangeable rate for a period of over fifteen years in view of the inflationary trend of the economy at that time. So, too, Sierra would never have wanted a fixed rate should a period of deflation occur during the life of the contract.

The evidence of the surrounding circumstances and the negotiations must be heard by the Commission to give any real meaning to the contract and to decide what the parties really intended.

2. Not Only Does the Commission Have the Power to Determine the True Nature of the Contract, It Has the Duty to Make That Determination.

The Commission has the duty to determine *now* whether or not the 1948 contract is or is not for a changeable rate. The Commission to date has not done so and it is obligated to do so. In this connection the following statements from the opinion in *Portsmouth Gas Co. v. F.P.C.*, ... Fed. .... (C.A.D.C. June 25, 1957) are most appropriate:

> "We think it essential that the record show the Commission's judgment—and its reasons for reaching it—as to the exact legally effective terms and conditions of the contract, if any, between United Fuel and Portsmouth as the same existed immediately prior to the entry of the order under review. While we may on occasion judicially notice Commission orders, we think it impractical and therefore improper to do so in this case, where the effect or validity of several orders may depend on the nature of the proceedings in which they were entered, and where conclusions must be reached from numerous orders and proceedings *and perhaps from the conduct of the parties—conclusions which should be made in the first instance by the Commission.* (Emphasis ours)
>
> "Consequently the order under review will be set aside as having been prematurely entered on an incomplete record which does not support it; and the case will be remanded to the Commission for such additional hearing and proceedings as may be necessary to enable it to supplement its original findings and conclusions by making findings and reaching conclu-

sions concerning the following and any other relevant matters not previously covered:

> "1. The terms and conditions of the contract of October 22, 1931, between United Fuel and Portsmouth, and whether that contract has been superseded by a new contract executed by the parties. If so, what is the new agreement?

The pertinency of the above quotation is only too evident. Clearly, it is the duty of the Commission to determine "in the first instance" matters of interpretation of contracts —especially "where conclusions must be reached . . . from the conduct of the parties." Our position could hardly be better stated.

Part II

The Commission Erred in Not Granting a Hearing to Determine Whether the Sierra Rate Is Adverse to the Public Interest.

Nowhere in its opinion does the Commission refer to the fact that Pacific's showing, which is virtually undisputed, demonstrates that revenues under the present rate are insufficient to cover the out-of-pocket costs of rendering service. In effect the Commission has decided that the relation between costs and revenues has no effect upon the public interest, a position which is entirely unrealistic and is in square conflict with the principles which the Commission employs in every other type of proceeding before it.

It seems evident that the Commission has missed the whole point of Pacific's showing when it says that Pacific's studies "show no more than that the Sierra business is somewhat less profitable to Pacific at the present time than at the time of the prior Commission proceedings". If this statement means that the Commission considers these studies relevant only to the extent that they show changes subsequent to the prior proceedings, it is clear that the Commission has completely misconstrued its function upon remand. The Supreme Court held that the issue of the

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effect on the public interest // "... is, of course, a question to be determined in the first instance by the Commission". The Supreme Court made no attempt to decide on the basis of the record then made whether there was an adverse effect upon the public interest and denied a subsequent motion by Sierra which asked the Court to modify its opinion to prevent further consideration upon remand. Thus the Court placed upon this Commission the burden of giving content to the Supreme Court's ruling that the rate could not be increased (if a fixed rate) unless it adversely affected the public interest.

In fairness to Pacific then, the Commission should decide this case not in the summary fashion of its order of July 10, 1957, but only after a full hearing in which it has had an opportunity to explore fully the contentions advanced and the effect on the public interest. As the matter now stands, all of the Commission's comments would apply even if Pacific were rendering service gratitously to Sierra. This is surely abdication by the Commission from a field in which the public interest is bound to be vitally concerned.

That service to Sierra at an out-of-pocket loss amounting to one half million dollars annually will have a direct and

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adverse effect upon the economics of // Pacific's operations should be immediately apparent. Whether these effects are adverse to the public interest is not really considered in the Commission's opinion. The Commission attempts to dispose of Pacific's showing that the out-of-pocket losses from service to Sierra will increase its cost of money by reciting the fact that Pacific did not offer to support this showing in certain specific ways. This is indeed a strange and erroneous method of eliminating from consideration a fact which is inescapable by the very line of reasoning which the Commission uses in every rate case which it decides. The relation between earnings and cost of money upon which the Pacific showing is predicated is the basis of every rate of return presentation before the Commission including the presentations of its own Staff. The failure of Pacific to recover its out-of-pocket cost from Sierra certainly and undisputably impairs its earnings and the effect of that impairment upon its financial position is equally undisputable and inescapable. We have heard no argument to the contrary, but only an intimation that relatively speaking the impairment is not large. The Commission, however, is not entitled to disregard a principle which is damaging to the public interest simply because the case

[3130]

involves only one half // million dollars a year. Public interest is just as much entitled to protection from attrition as it is from greater assaults upon its integrity.

Certainly the obligation of the Commission at this stage of the proceeding is not to look for technical defects in Pacific's offer of proof, but to determine whether there is any reason to believe that the public interest may be adversely affected. When we turn to the Commission's disposition of Pacific's showing with respect to the burden of such out-of-pocket losses upon its other customers, we find again that the Commission takes refuge in technicalities rather than meeting the basic issues which are presented by the motion for a hearing.

First, the Commission disposes of the fact of subsidization of the Sierra service by other customers by saying that Pacific "does not seek to show that the low return which it derives from the Sierra business is offset by excessive returns from other sales". This statement ignores the fact that Pacific showed that there are out-of-pocket expenses which have to be met with revenues from other customers if the service to Sierra is to be continued. This showing was not based upon a mere "low return" from the

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Sierra business; it was // based upon the failure of revenues from Sierra to cover the money outlays necessary if the Sierra service is to continue. Furthermore, it must be evident to this Commission that the revenue required from other customers must inevitably be greater if these out-of-pocket losses continue than would otherwise be the case in order to maintain the credit standing of the Company.

We have already pointed out the error in the Commission's attempted disposition of the fact that these out-of-pocket costs will result in higher costs of money to the Company. The resulting burden of such higher costs on all of the Company's customers is clear.

Lastly, on the subject of burdens on other customers, the Commission attempts to get around the fact that capital requirements for service to Sierra must be obtained by utilizing credit based solely on the earnings of other portions of the Company's business. It states that the Sierra business is not financed as a separate segment; but this is no answer. We fail to see the relevance of such a statement and we think it perfectly clear that it is in the public interest to prevent the situation which has arisen. There is no question but that Pacific's other customers made it possible to finance the enlargement of transmission facilities which

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was accomplished // while these very motions were pending, at an expenditure in excess of one million dollars. The conclusion that it is contrary to the public interest to permit service to Sierra to continue at rates which make it a burden upon the general credit of the Company certainly should be considered by the Commission after a full hearing.

The same failure to perceive the issues is inherent in the Commission's discussion on the matter of discrimination. The opinion refers to the differentials between the Sierra rate and other rates of the Company for admittedly generally comparable service. Normally a showing of such differentials would constitute a *prima facie* case of discrimination which could be refuted only by showing some justification for the differentials. The Commission, however, seems to place the burden on Pacific to negate all possible justifications. The Commission says that Pacific does not seek to show that the other customers bear disproportionate shares of Pacific's total cost of service. However, the fact that they do bear such a disproportionate share is the only conclusion that can be drawn from the evidence. It is clear that costs to serve Sierra are higher than costs to serve the other resale customers, largely by reason of the long transmission lines devoted exclusively to service to Sierra.

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When other // customers are paying higher rates for less costly service, it is a mathematical certainty that the share of costs paid by those customers is disproportionately high with relation to the costs borne by Sierra. Further on the subject of discrimination the Commission states that Pacific does not seek to show that the other customers are placed at any competitive economic or other disadvantages thereby. We are aware of no authority which makes such a showing part of a case on discrimination. At the most such an issue could be only one of a number of possible relevant items. Consequently, the absence of a showing on this point can not be an infirmity in Pacific's case.

Conclusion

We respectfully submit that both the public interest and the needs of justice require the Commission to reconsider its order of July 10, 1957 and to hold hearings and make findings on the substantial questions presented by Pacific and as yet not adjudicated by the Commission.

Further, we urgently and respectfully request that the Commission grant Pacific the opportunity to present *oral* argument on this application for rehearing and respectfully urge that the Commission stay its order of July 10, 1957 until the disposition of this application for rehearing.

Respectfully submitted,

Pacific Gas and Electric Company
By E. E. MANHARD
E. E. Manhard

FREDERICK W. MIELKE, JR.
MALCOLM H. FURBUSH
of Counsel

F. T. SEARLS
JOHN C. MORRISSEY
ROBERT E. MAY
Attorneys for
Pacific Gas and
Electric Company

[3135]

State of California
City and County of San Francisco—ss.

E. E. Manhard, being first duly sworn, on oath, says that he is the Secretary of Pacific Gas and Electric Company; that as such officer he has executed the foregoing application, and that the matters and facts set forth therein are true to the best of his information, knowledge and belief.

E. E. Manhard

Subscribed and sworn to before me
this 8th day of August, 1957

Marie H. Stanley
Notary Public
in and for the City and County of
San Francisco, State of California
My Commission Expires November 22, 1959.

* * * * * * *

[3137]

[Exhibit A]

[3138]

[Title of Commission and Cause Omitted]

AFFIDAVIT OF N. R. SUTHERLAND

State of California
City and County of San Francisco—ss.

N. R. Sutherland, being first duly sworn, deposes and says as follows:

I am the President and General Manager of Pacific Gas and Electric Company (PG&E) and am the person who personally negotiated with Mr. F. A. Tracy, President of Sierra Pacific Power Company (Sierra), the 1948 contract involved in the present proceeding. At the time such negotiation took place I occupied the position of Vice President in charge of Public Relations and Sales. [For convenience, I use terminology already used in my verified and sworn statements previously made in these proceedings.]

Negotiations for the contract were conducted over the period from January 1947 to March 1948 and the basic

negotiations // were finally concluded in Reno, Nevada, in October 1947. During the latter negotiating session, a rate for the contract was agreed upon. Until this time, Sierra had refused to accept our offer to continue the existing rate with the addition of a fuel clause, but refused to say definitely what rate it would accept. At the Reno session, I asked Mr. Tracy what rate Sierra wanted. He told me [flatly] that Sierra wanted our resale (P-31) rate. I told him that to conclude the long stalemated negotiations we would give him this rate. [the resale (P-31) rate.] This was an optional resale rate on file with the California Public Utilities Commission and was lower than our then existing contract rate plus the fuel clause.

To give Sierra the resale (P-31) rate, it was necessary to draw a special contract rather than merely apply the P-31 rate to the Sierra service according to its terms. This was so for two main reasons: First, the filed P-31 rate provided for only a five-year period, whereas the Sierra contract was to run a minimum of 15 years in order to protect the large investment in transmission lines to be made by Pacific Gas and Electric Company. Second, the Sierra contract had to include certain additional charges to cover standby service for Sierra's own generation. There was no question, however, that apart from the standby charge the rate agreed upon in *dollars* was understood to be merely a method of specifying the *filed* P-31 rate, subject to all changes that might subsequently be made in this filed rate over the

[3140]

life of // the contract. We both acknowledged to each other that the contract did not expressly state our intention to use a *filed* rate as the contract rate, and we openly discussed our understanding that the rate was nevertheless to be treated for all purposes as the filed P-31 rate even though it was not named as such in the contract. I asked Mr. Tracy if he understood that the contract rate would move up or down with the filed P-31 rate, and he stated to me that he positively did so understand.

Following the Reno negotiation, the contract was prepared for signature. During the preparation of the contract it was discussed by me with Mr. J. B. Black, then President of Pacific Gas and Electric Company and now Chairman of the Board, and I told him that the contract was for the P-31 rate. When he learned that the P-31 rate was not mentioned by name, he asked if it was clearly understood that the rate could be changed if the P-31 rate was changed. I told him that it was so understood and related to him the express understanding I had with Mr. Tracy on this point.

When the time came to sign the contract, I was troubled by Mr. Black's inquiry and the thought that there might be room for a misunderstanding. I therefore did not sign the contract until I checked again with Mr. Tracy to make absolutely sure that there would be no problem over our understanding that the rate in the contract was subject to change upward or downward as the P-31 rate might change

[3141]

over the life of the contract. I told // him that before I signed the contract I wanted to make sure that it was perfectly understood that the rate in the contract was the P-31 rate and would move up or down with changes in the

P-31 rate. Mr. Tracy again acknowledged his understanding of this point. He said that he understood we had to have it that way—that it could not be any other way because the rate was subject to change by the California Public Utilities Commission.

Being thus reassured by Mr. Tracy that there was no misunderstanding on the point that the rate was subject to change whenever we might justify a change in the filed P-31 rate, I signed the contract.

Subsequently, as related on page 5 of our Submission of October 13, 1956, in this case, Pacific found its costs of service had mounted so severely that on October 19, 1949, it applied to the California Commission for an interim 6% increase in substantially all of its rates, including the P-31 rate. In accordance with the intended terms of our agreement with Sierra, such an increase in the filed P-31 rate would have meant a similar increase in Sierra's rate. After our application for the rate increase was filed, Mr. Tracy talked to me and stated his recognition of this fact and made a special request that we exempt Sierra temporarily from the requested increase. I was reluctant to accede to this request and Mr. Tracy openly acknowledged to me

that he had no right // under our agreement to insist upon such an exemption of Sierra but argued that it would cause dissatisfaction among rather vocal elements in his service territory if the rate were raised so soon and that it would be personally embarrassing to him if we did not exempt Sierra temporarily from this increase. Since he asked for a temporary exemption only, I could not have great objection, and granted the request, particularly since it would help public relations in his community.

The interim increase, but with exemptions for Sierra and certain other customers, was authorized by the California Commission early in 1950. Following the outbreak of the Korean War later that year, we found our costs of service still mounting and in 1951 applied to the California Commission for a general increase for substantially all our electric rates, including the P-31 rate and all contracts based upon it, such as Sierra's.

At this hearing, Sierra remained only partially true to Mr. Tracy's representations when he had requested the exemption from the earlier "interim" increase. Sierra remained true to its position in that it did not contend that its rates could not be changed along with the P-31 rate. But it argued that, before its rate was changed to reflect changes in the P-31 rate, Sierra should be given a chance to "negotiate" a better rate with Pacific. The Commission granted this request. (51 Cal. P.U.C. at pp. 151-152; 96 P.U.R.

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(n.s.) at pp. 524-526.) Despite its // request to the California Commission, Sierra refused even to negotiate. It took the position that, since the Commission had not directly ordered the increase in Sierra's rate, its rate remained unchanged.

Finally, before this Commission, Mr. Tracy completely repudiated his understanding with me by claiming that the Sierra rate was fixed for the life of the contract.

I will attend any further proceedings which the Commission may see fit to hold in this matter and testify to the foregoing under oath.

N. R. SUTHERLAND

Subscribed and sworn to before
me on August 7, 1957.

MARIE H. STANLEY
Notary Public
In and For the City and County of
San Francisco, State of California
(SEAL)
My Commission Expires November 22, 1959.

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[7798]

PACIFIC GAS AND ELECTRIC CO.

February 15, 1957

Federal Power Commission
441 G Street
Washington, D. C.

Attention: Mr. Joseph H. Gutride, Secretary

Dear Mr. Gutride:

I forward for the information of your Staff a copy of my letter of February 4, 1957, to Mr. F. A. Tracy, President of Sierra Pacific Power Company. I believe that this letter is self-explanatory.

In addition to the enclosed letter, I forward a copy of the schedule designated "Revised, Schedule 1, Sheet 1". This schedule shows the costs which could be eliminated by Pacific Gas and Electric Company's discontinuance of service to Sierra Pacific Power Company, and compares these

This material will be found at pp. 489-493 of this volume.

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This material will be found at pp. 489-493 of this volume.

costs with the estimated annual revenues which would be received for such service under the rate specified in the contract and the rate filed as Rate Schedule FPC No. 3, Supp. 1. This schedule was prepared on the basis of fuel oil prices as effective 1952-1956, as well as at the fuel oil price of $2.75 per barrel, tank car delivery, (effective as of 1-21-57) for the period 1957-1971.

We forward this information so as to keep your Staff informed of the present and future status of our deliveries of electric energy to Sierra Pacific Power Company.

Very truly yours,

/s/ N. R. SUTHERLAND

enclosures
cc: Bob May

[7799]

PACIFIC GAS AND ELECTRIC COMPANY

February 4, 1957

Mr. F. A. Tracy, President
Sierra Pacific Power Company
Reno, Nevada

Dear Frank:

As you know, the second 110 kv transmission line referred to in the agreement of March 4, 1948, between our two companies has been completed and is now in service. From the load growth for your system as indicated in your letter of November 18, 1954, it appears that the capacity of this second line will be adequate until about 1960, or four years before the normal expiration of the contract in 1964. It thus appears that, although this Company's obligation to provide transmission facilities under the contract has now been fully met, these facilities will not be adequate to meet your power needs during the remaining life of the contract.

You will recall that a similar situation arose in 1947 when you found it necessary to make arrangements for additional power because the transmission facilities installed under our contract with your Company of June 6, 1938, were expected to become inadequate before the expiration of that contract in 1953.

I wish to suggest that you again give early consideration to the development of an additional source of power before any serious power shortage develops on your system. Should you wish to negotiate with us for additional power, we would, of course, be willing to enter into negotiations. We stress, however, the importance of entering into such negotiations soon, well in advance of the impending power shortage, so that there may be ample time to plan for and build the additional facilities required.

You may wish to build additional generating capacity yourselves, or obtain additional power from other parties, to supply your requirements in excess of the supply available from the existing transmission facilities, your existing generating plants, and the minor sources referred to in Paragraph 1 of the contract. We recognize that the limitations of Paragraph 1, requiring you to purchase your power requirements from us, could not apply to power which could not be delivered over the transmission facilities installed by our two companies under the contract. On the other hand, we shall naturally insist that you take from us all your power requirements up to the capacity of these transmission facilities, as is contemplated by the agreement.

We wish to make it perfectly plain that under our present contract you cannot rely upon a power supply from this Company beyond the capacity of the now existing transmission facilities. In the absence of arrangements by you for an additional power supply, the responsibility for any power shortage which might develop on your system must clearly rest with your Company.

Very truly yours,

/s/ N. R. SUTHERLAND

NRS: ACS
cc: RHG
SLS
WD/WRJ
GAP
JSM
FTS

* * * * * * *

[7802]

THE CALIFORNIA OREGON POWER COMPANY

Pacific Gas & Elec. Co.
Sierra Pacific Pwr. Co.
Docket Nos. E-6482, E-6697

January 23, 1957

Mr. Leon M. Fuquay, Secretary
Federal Power Commission
Washington 25, D. C.

Dear Mr. Fuquay:

This acknowledges your letter of January 11, 1957 inviting comments concerning the proceedings before the Commission involving Pacific Gas and Electric Company and Sierra Pacific Power Company.

This company is not aware of any effect upon its electric consumers of the particular rates and charges at which P G & E may furnish service to Sierra. The question whether undue discrimination against this company exists under Section 205 of the Federal Power Act by reason of continuance of the P G & E service to Sierra at the rates and charges embodied in P G & E's rate schedule, FPC No. 3, is a question respecting which this company does not feel sufficiently informed at this time to express an opinion.

Very truly yours,

J. C. Boyle
Vice President and
General Manager

JCB:EA
cc Sierra Pacific Power Co.
Pacific Gas & Electric Co.
Public Utilities Commissioner of Ore.

* * * * * * *

[7814]
July 26, 1956

Mr. Leon M. Fuquay
Secretary
Federal Power Commission
441 G Street, NW
Washington 25, D. C.

Re: *In the Matter of Pacific Gas and Electric Company*
Docket No. E-6482

Dear Mr. Fuquay:

Under date of June 8, 1956, Pacific Gas and Electric Company filed its motion for reopening and further hearing of the above proceeding.

Under date of June 26, 1956, Sierra Pacific Power Company filed its answer thereto in opposition to said motion, attaching two exhibits thereto. Under date of July 17, 1956, Sierra filed a Supplemental Answer, attaching two further exhibits thereto.

Said answers, based upon erroneous views of the law and facts, matters outside the record, mistaken assumptions as to the issues, and unjustified inferences, clearly indicate the need for reopening of this proceeding so that the Commission may be in possession of all the relevant evidence before terminating this case in favor of one party or the other.

It is respectfully requested therefore that the Commission either grant the motion or give Pacific leave to file a reply to said Answers. Pacific estimates that preparation of its reply will require until September 1, 1956 in order properly to present the facts, the economic basis, and the law in support of its position.

Very truly yours,

F. T. SEARLS

FTS/lg
cc: Mr. Howard Wahrenbrock
cc: Winthrop, Stimson, Putnam & Roberts
bcc: NRS
RHG
JSM/JFR
SBB
Bob May

* * * * * * *

[819]

Mr. Wahrenbrock: Mr. Pollard, there has been evidence that Pacific Gas and Electric, prior to the execution of the

[820]

1948 contract, at one time sought to have // included a fuel oil escalator clause and the contract, as ultimately entered into, did not include such a provision. Why was a fuel clause sought?

Mr. Pollard: I hate to answer that question without my notes here, but if I am not mistaken, the fuel clause and the P-31 Schedule were both offered at the same time, were they not? That is my memory of it.

Mr. Wahrenbrock: It was my recollection that the P-31 was the alternative to the original request, which had included a request for a fuel oil escalator clause.

Mr. Pollard: I would like to look at P-31, if I may.

Mr. Wahrenbrock: Surely. Do you have one available to you?

Mr. Pollard: I think I have all the exhibits here. P-31 does not have a fuel clause in it.

Mr. Wahrenbrock: That is right.

Mr. Pollard: And in the final clinches of these negotiations, we agreed to substitute P-31, our general resale schedule, for the previous rate that had been offered, including the absence of a fuel oil clause.

Mr. Wahrenbrock: Yes. Now, my question is why had you originally sought a fuel oil escalator clause?

Mr. Pollard: Prior to that time in the first rate that we offered, I think there was a fuel oil clause included

[821]

with the old P-6 rate, which was the resale rate that preceded P-31, and it was on that basis that Mr. Fisher made his first tentative offer back a couple of years before this contract was finally consummated.

Mr. Wahrenbrock: I am still trying to get the reasons for asking for a fuel oil escalator clause.

Mr. Pollard: Of course, the reasons for asking for a fuel oil escalator clause was because of the fact that you have steam power included with the power that you are delivering to the customer, and the cost of generating the steam would, of course, add to the price of the fuel.

Our gas purchase prices in many cases are tied to the price of fuel in the California fields, and it was undoubtedly to keep the sale price to Sierra Pacific commensurate, in part at least, with the cost of delivering the Service.

Presiding Examiner: A moment ago, Mr. Pollard, you referred to the Schedule P-6.

Mr. Pollard: Yes, sir.

Presiding Examiner: Were you referring to the one which is a part of the contract between Pacific Gas and Electric and the one of the predecessors of Sierra Power which was executed in 1923?

Mr. Pollard: P-6 in 1923 was the only resale rate that we had.

[822]

Presiding Examiner: My question was: Is that the rate schedule you were referring to in your answers to Mr. Wahrenbrock?

Mr. Pollard: No. P-6 was amended and changed a number of times, but it is the same schedule number.

Presiding Examiner: Where is the one in the exhibits we have to which you were referring?

Mr. Searls: There are two forms of P-6 in Exhibit 8.

Mr. Pollard: The last P-6 Schedule in Exhibit 8 became effective in 1939.

Presiding Examiner: And that is the one to which you had reference?

Mr. Pollard: Yes. I note now that it has no fuel oil clause in it.

Presiding Examiner: That is right.

Mr. Wahrenbrock: Referring, if you will, please, Mr. Pollard, to Exhibit No. 11, pages 20 and 21—and particularly page 21—when I referred earlier to the Company's proposal in its negotiations for the 1948 contract to include a fuel oil escalator clause, I had reference to such a suggestion as appears in the first new paragraph on page 21.

You understood me to have such reference in mind when I asked my question?

Mr. Pollard: My mind wasn't working very fast when [823] you asked the question, but that was Mr. Fisher's proposal in January 1947, in the letter to which you are now referring, that we would want a long-term contract, say 15 years, at substantially the same rates as those described in our present contract, except for the inclusion of an escalator fuel oil clause.

Mr. Wahrenbrock: And in response to my questions you stated the reasons why a fuel oil escalator clause would be desirable, and I take it that the reasons that you gave would make it equally desirable in the case of any sale to a purchaser for resale, equally.

Mr. Pollard: Yes, I think it would apply to any such customer—in fact in the degree it would apply to all customers, on a rising market in the oil market.

Mr. Wahrenbrock: This may be repetitive but I want to make sure that it is plain: There was in 1947 and 1948 no fuel oil escalator clause in your rates which you were charging other purchasers for resale, either under a general tariff or under special contract, was there?

Mr. Pollard: We have had fuel oil clauses and we have not had them and I don't have all the rate schedules clearly in my mind without comparing schedules to answer that definitely.

Mr. Wahrenbrock: Let me ask this then: Do you know of any factors which justified the company's proposal

and request for inclusion of a fuel oil escalator clause in its contract with Sierra Pacific, which such provisions were not included and to the extent that such provisions were not included in sales to other purchasers for resale.

Mr. Pollard: I can only assume Mr. Fisher's reasons for putting that suggestion into his offer of January 1947. I think that at that time he was not considering the Sierra contract as one of average conditions on what Mr. Roberts calls the integrated transmission substation delivery; he was considering the fact that considerable sums of money had to be expended at that time for the additional line which would not be fully loaded for some time after it was built. This was a proposal not on the basis of the filled schedules or even on the basis of putting this customer on the general resale schedule.

This was a special proposal, a special rate, for all the conditions surrounding this particular sale.

Mr. Wahrenbrock: Was it felt by the company at that time that this transaction was in many important respects unique?

Mr. Pollard: I think it was, yes, sir.

BRIEF AND APPENDIX FOR PETITIONER

In the

United States Court of Appeals

for the

District of Columbia Circuit

No. 14,422

Pacific Gas and Electric Company, *Petitioner,*

vs.

Federal Power Commission, *Respondent.*

Sierra Pacific Power Company, *Intervener.*

Petition to Review Order of Federal Power Commission

F. T. Searls
245 Market Street
San Francisco 6, California

590

Robert E. May
1700 K Street, N.W.
Washington 6, D.C.
Attorneys for Petitioner

Of Counsel:
Frederick W. Mielke, Jr.
Malcolm A. MacKillop
Roger J. Nichols
245 Market Street
San Francisco 6, California

May, Shannon and Morley
1700 K Street, N.W.
Washington 6, D.C.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

QUESTIONS PRESENTED

1. Where an administrative agency decides a case in favor of party P by finding in P's favor on one ground, but refuses to find whether P should prevail on a second alternative ground urged by P, and the agency is then reversed as to the one ground on an appellate review brought by S (the losing party before the agency), may the agency on remand consider whether P is entitled to prevail on the alternative ground originally urged?

2. Where the Federal Power Commission has, on its own motion, made an investigation and held hearings on the reasonableness of an electric utility's rate, both existing and proposed, made findings and an order authorizing the proposed higher rate, and then been reversed on appeal because of insufficient findings as to whether the existing rate was "so low as to adversely affect the public interest," is it an abuse of discretion for the Commission to find on remand that the existing rate "may" be so low as to adversely affect the public interest but refuse to reopen the hearings to determine whether it is or is not?

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JURISDICTIONAL STATEMENT

Petitioner is a party aggrieved by an order issued July 10, 1957, by the Federal Power Commission. A timely petition for rehearing was denied by the Commission on September 5, 1957. A timely petition to review the order was filed in the Court of Appeals for the Ninth Circuit November 1, 1957, pursuant to Section 313(b) of the Federal Power Act. (49 Stat. 860; 16 U.S.C. § 825 *l*(b).)The Ninth Circuit has transferred the case here (*Pacific Gas and Electric Co. v. F.P.C.,* 253 F.2d 536 (9th Cir. 1958)), and this Court has accepted the transfer (*Pacific Gas and Electric Co. v. F.P.C., per curiam* opinion, Oct. 24, 1958, ... App. D.C. ...., ... F.2d ....).

STATEMENT OF THE CASE

Summary[1]

This controversy arose from an effort to increase a wholesale electric rate charged by one electric utility to another.

Pacific (Pacific Gas and Electric Company) sought to increase a resale electric rate charged to Sierra (Sierra Pacific Power Company) for wholesale electric service after cost increases had substantially reduced the return realized by Pacific on the service and after the California Public Utilities Commission had found that, as a result of the cost increases, Pacific's revenue from all of its resale service, including Sierra's, had dropped to about 35% below the cost of rendering the service.

The rate in question was put into effect ten years ago, in 1948, at a time when the two utilities entered into a 15 year contract for wholesale electric service. The contract is extendible to 1971.

It is conceded that costs of service have increased since 1948 and that the return formerly realized by Pacific on this service has vanished. Because of these facts the Federal Power Commission in 1954 allowed Pacific a rate increase to restore the return formerly realized under the contract. The increase allowed was the same as that authorized by the California Commission for similar resale service. The order of the Federal Power Commission, however, was set aside by this Court and the Supreme Court affirmed on certiorari (*Sierra Pacific Power Co., v. F.P.C.,* 96 App. D.C. 140, 223 F.2d 605 (D.C. Cir. 1955); aff'd *F.P.C. v. Sierra Pacific Power Co.,* 350 U.S. 348 (1955)). The case was then ordered remanded to the Commission for "such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable" (350 U.S. at 355).

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[1] Record references will be found in the complete statement of facts following.

In ordering the rate increase originally, the Federal Power Commission had ruled that certain contentions made by Sierra were immaterial. Sierra had argued that, because of a claimed competitive situation, the rate in the contract was meant to be "fixed" for the entire life of the contract and that such a fixed-rate contract could not be changed by the Commission in a proceeding under § 205 of the Federal Power Act (49 Stat. 851; 16 U.S.C. 824d), but could be changed only in a proceeding under § 206 of the Act (49 Stat. 852; 16 U.S.C. § 824e). Pacific had taken issue with this argument before the Commission. It had contended that the rate used in the contract was not meant to be fixed for the life of the contract, but was intended to be changeable. Pacific had pointed out that the rate used in the contract was Pacific's P-31 rate then on file with the California Public Utilities Commission, that the parties knew this, and that they agreed the rate would be changed, upward or downward, whenever the California Commission found the P-31 rate to be unreasonable—which the California Commission did in 1952, just prior to the commencement of the F.P.C. proceeding. The 15 year minimum term of the contract, Pacific had argued, was not intended by the parties to assure that the rate would continue unchanged for 15 years, but was meant to assure that the service would continue long enough to amortize the large investment in transmission lines and other facilities which had to be built to provide the increased service to Sierra under the contract.

In deciding the case, the F.P.C. did not resolve the dispute as to whether the parties had agreed to a fixed or changeable rate and made no findings on that issue. It simply ruled that *any* contract, even a fixed-rate contract such as Sierra claimed it had, could be changed by the Commission in a § 205 proceeding (*Re Pacific Gas and Electric Co.,* 7 P.U.R. 3d 256 (1955)).

In reversing the Commission, both this Court and the Supreme Court ruled that a "fixed" rate contract (such as Sierra claimed it had and the Commission assumed for purposes of its decision that Sierra had) could not be changed in a § 205 proceeding. Both held that such a rate could be changed only in a § 206 proceeding. The Supreme Court further held that such a rate could be changed in a § 206 proceeding only if it were found to be "so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden or be unduly discriminatory" (350 U.S. at 355). If such a finding had been made by the Commission, the Supreme Court said, "the Commission's order could have been effective" because "it would seem immaterial" that the Commission's investigation had started under § 205 rather than § 206 (350 U.S. at 353).

These circumstances set the stage for the Commission's subsequent action which Pacific believes to be in error.

Following the remand, Pacific asked the Commission to make its findings as to whether the rate set forth in the contract was "so low as to adversely affect the public interest" according to the standard laid down by the Supreme Court for a § 206 proceeding. Pacific also asked the Commission to decide the question left undecided in the original proceeding—namely, whether the parties in fact had agreed to a fixed rate for their contract, as Sierra contended, or had agreed to a changeable rate, as Pacific contended.

The Commission on July 10, 1957, denied both of Pacific's requests. It held, first, that the issue as to whether the parties had in fact agreed to a fixed rate was precluded from consideration because of the Supreme Court's opinion. It held, second, that the facts alleged by Pacific to show that the existing rate was so low as to be against the public interest merely indicated that the rate "may or may not" be against the public interest, and it declined to hold a hearing to determine whether it was or was not.

After a timely petition for rehearing was denied, Pacific brought the instant petition for review of the Commission's July 10, 1957, order.

It is Pacific's contention that the Commission's action in refusing to resolve the conflict as to the actual agreement of the parties and in refusing to decide whether the present rate is in fact against the public interest was erroneous, arbitrary, an abuse of discretion, and a denial of due process of law.

In order to provide the factual background for our argument, the essential facts will now be set forth briefly.

Facts

THE P-31 RATE CONTRACTS.

In the years following the end of World War II, Pacific negotiated a series of contracts with certain large wholesale users of electricity. Most of these contracts were negotiated with municipalities and other public agencies in California, such as the cities of Alameda, Biggs, Gridley, Lodi, Palo Alto, and Santa Clara, and the Sacramento Municipal Utility District (R. 2065-2066~~).~~; Tr. 347, 305-306, 547).[2] In addition to these public agencies, wholesale contract were also negotiated with private utilities such as Coast Counties Gas & Electric Company, Pinole Light & Power Company, Vallejo Electric Light & Power Company, and Bay Point Light and Power Company (R. 2065-2066; Tr. 395-396).

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[2] References designated "R. 000" are to pages of the record which are printed in the Joint Appendix, in case No. 12,430. References designated "Supp. App. R. 000" are to pages of the record which will be printed in the Supplemental Joint Appendix in the present case, No. 14,422. (See this Court's order of October 24, 1958.)

All of these contracts provided for a rate known as Pacific's P-31 rate (R. 2065-2066). This was a published rate on file with, and regulated by, the California Public Utilities Commission. The rate was available to all wholesale purchasers coming within its terms. By its terms, P-31 gave a lower-than-usual[3] rate to those wholesale purchasers with no electric generation of their own (mostly municipalities and other public agencies in the business of operating local electric distribution systems) if they agreed to purchase all their power needs from Pacific for a period of five years (Supp. App. R. 1579; Tr. 1850).

The P-31 rate was concededly designed to be competitive with "cheap" federal power which was becoming available in limited quantities to a few municipalities and other public agencies lying within the vast Central Valley area of California because of electricity being generated from the facilities of the Central Valley Project, a U. S. Bureau of Reclamation development, one component of which was Shasta Dam r. 269, 279, 96-307). Under statutory "preference" provisions, the first call on this government power, after the needs of the federal government were met, was to municipalities and other public agencies (Supp. App. R. 385).

Although designed principally for those few potential preference customers close to the federal power in the Central Valley, the P-31 rate was made generally applicable to all wholesale customers who could meet its terms, whether or not a "competitive" condition actually existed

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[3] The usual wholesale (or "resale") rate was Pacific's P-6 rate on file with the California Commission. Thus, P-31 was known as an "optional resale rate." (Tr. 565.)

; Tr. 353, 395-397, 399-401, 403, 595-596, 597, 815, 816-817, 1229-1230).

as to them, in order to treat all wholesale customers as equally as possible (Supp. App. R. 317). Thus, the P-31 rate was made available to Coast Counties Gas & Electric Company, Pinole Light & Power Company, Vallejo Light & Power Company, and Bay Point Light and Power Company, even though they were private utilities without "preference" to obtain the government power being transmitted into the Central Valley area of California (Tr. 395, 1299-1300; R. 2065-2066).

NEGOTIATION OF THE SIERRA CONTRACT.

During the same period, in 1947, Sierra Pacific Power Company opened negotiations with Pacific to purchase additional wholesale power. Sierra was a private utility serving parts of California bordering on Nevada near the Lake Tahoe area, far away from the Central Valley area and high on the eastern edge of the Sierra Nevada Mountain Range. Sierra's main service territory was in Nevada, particularly in and around the City of Reno, where Sierra's main offices were located (R. 623).

In 1947, Sierra was receiving power from Pacific under a 15 year wholesale contract entered in 1938. Prior to 1938, it had received power from Pacific under another 15 year wholesale contract entered in 1923 (Supp. App. R. 1920). Sierra had very little generating capacity of its own and purchased virtually all its power from Pacific (R. 623-624). This power was delivered to Sierra by means of two 60,000 volt transmission lines, one approximately 27 miles long and the other approximately 19 miles long, which connected with Pacific's Drum and Spaulding substations, respectively, the two nearest available power sources of Pacific (Supp. App. R. 48-49). The first of these lines was constructed pursuant to the 15 year contract entered in 1923; the second was constructed pursuant to the 15 year contract entered in 1938 (Supp. App. R. 66-67, 1920).

By 1947 it had become apparent to Sierra that the capacity of the two existing transmission lines would be exceeded before 1953, the normal expiration date of the 1938 contract, and that a new transmission line would have to be built before then to supply Sierra's increasing needs (R. 624 1613-1614; Supp. App. R. 636-638, 1026-1027). Sierra, therefore, sought a new 15 year contract with Pacific under which Pacific would build a third transmission line to bring additional power to Sierra (Tr 29-. It was soon agreed that the parties would enter into such a 15 year contract, that Pacific by October 1, 1949, would build a third transmission line (110,000 volts in capacity), and that, should Sierra's needs require it, another 110,000 volt transmission line would be built by Pacific in the future (R. 155- 155. In the latter event, the contract was to be extendible for a new 15 year period beginning after the second 110,000 volt line was completed (R. 1558).[4] The 15 year terms were related to the investment in transmission facilities (R. 1675; Supp. App. R. 394 294-295 307-305 [illegible] 327-328 55-556 60-561).

Although agreement was readily attained as to the period the contract was to run (Tr. 395, 665) and as to the transmission facilities that were to be built, difficulty arose in agreeing upon the rate that was to be charged. Sierra desired a lower rate than that which was in effect under the 1938 contract (Supp. App. R. 626-627). Sierra, like Pacific, was feeling the impact of "cheap" government power from the Central Valley Project (R. 1984; Supp. App. R. 316-317, 978). The United States Bureau of Reclamation had reserved a block of power for use in Nevada, and there was some agitation by civic groups in Nevada to bring this power to Nevada (R. 648-649, 690; Supp. App. R. 316-317 671-673). Sierra was sensitive to this agitation and desired a lower rate to help

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[4] This second 110,000 was built in 1956, making the contract extendible to 1971.

, 1999. Tr 1176, 1132,
386 Supp. App. R. 3

counter it (R. 1616-1617; Supp. App. R. ~~[illegible]~~ 973) and prevent government power from gaining a foothold in the Reno area (R. 1989, 1999. Tr 1176, 1132, 386 Supp. App. R. 3

There were sizeable obstacles to bringing the government power to Nevada, however (Tr 1176). Chief of these was the fact that the nearest point of connection to the government power source would have been at the government's proposed substation at Elverta, near Roseville, California (R. 1859). This was approximately 88 miles away, more than three times the distance to Pacific's Drum substation (R. 2078). Neither the Elverta substation nor the government's transmission lines leading to it had been built, however, (Tr. 346; R. 2078, 641) and the next alternative would have been to build a transmission line direct from the government's Keswick Powerhouse to Reno, a distance of 215 miles (R. 2078, 709; Tr. 387). Besides the extra expense of building the long transmission lines to connect with the government power, it also appeared that the lines could not be built in time to meet Sierra's growing needs (R. ~~[illegible]~~ 695-696, 656-657, 707, 1927; Tr. 1006-1007, 1029, 1176). Moreover, it appeared that under the priorities in force for the government power, because of statutory "preference" (R. 640-641, 1999. Supp. App. R. 385) and for other reasons, the power was not as dependable as that supplied by Pacific (R. ~~[illegible]~~ 1998-1999; Supp. App. R. 387-389, 1607-1608, Tr. 448-449). This meant Sierra would have to arrange for a large block of expensive standby power to "back up" the federal power even if it could be obtained (R. 1997-1999; Tr 392, 447, 448-449, 1009-1011). In any event, as the Federal Power Commission subsequently found (R. 2591), Sierra regarded the government power as entirely unacceptable, as Pacific well knew (~~R.~~ 310, 316, 345, 358, 558-559, R. 1999, 1673-1675, 1682-1683).

While Sierra was pressing for a rate lower than that in the 1938 contract, Pacific, because it felt a lower rate was not justified in the face of the large additional investment in transmission facilities required, pressed for a continu-

(Supp. App. R. 822-524 1634; Tr. 629-630; R. 1632)

ance of the existing rate[5] with the addition of a fuel escalation clause under which the rate would escalate, upward and downward, in accordance with any fluctuations in the price of fuel oil used to generate some of the electricity which Pacific supplied Sierra [redacted]. The impasse was not resolved until October, 1947, when Mr. Frank Tracy, Sierra's president, and Mr. N. R. Sutherland, Pacific's vice-president in charge of public relations and sales, met in Reno [redacted]. At this meeting, the stalemate was broken by Pacific's agreement to extend to Sierra the optional resale rate on file with the California Commission, the P-31 rate (R. 689-690; Supp. App. R. [redacted]; 3138-3141; Tr. 403-404, 1306-1307).

59, 47- [illegible] 39 [illegible] 6-1307).

Although the parties agreed to the P-31 rate, this rate could not be simply incorporated by name into the contract. This was so for two reasons: First, the P-31 rate as on file with the California Commission provided for only a 5 year contract (Supp. App. R. 229, 1579; Tr. 1850, 307), whereas the Sierra contract was to run a minimum of 15 years, because of the large investment required in new transmission facilities, as we have already noted (R. 1675-1676; Tr. 307, 305). Second, Sierra supplied some of its power needs itself from its own generating facilities (R. 622) and did not fall directly within the terms of the P-31 rate, which required all the power needs of the customer to be supplied by Pacific (Supp. App. R. 1579, 3139; Tr. 185). This necessitated a small standby charge which did not appear in the P-31 rate schedule. Thus, the P-31 rate schedule was not referred to specifically by name in the contract, as was done in other contracts using the P-31

App. 3139;

232, 235-6, 307, 50; Supp. R. 1579).

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[5] This was a rate based on Pacific's P-6 rate (Tr. 295, 314-315;) the standard resale rate on file with the California Commission (Supp. App. R. 1577). The 1923 contract with Sierra provided directly for the P-6 rate. (Supp. App. R. 93, 821; Tr. 245-246, 381-382).

rate.[6] Instead, only the applicable rate provisions in the P-31 schedule were used in the contract (Tr. 307). These were lifted from the schedule and embodied in the Sierra contract in dollar amounts only (Tr. 220-23 564-566, 1950; Sup App. R. 15 It was clear, however, that except for the standby charge the rate expressed in dollars in the contract was the P-31 rate (Tr. 304-307, 561; R. 1671, 2584; Supp. App. R. 3139-3140).

To eliminate any doubt that the rate specified in dollars in the contract was understood to be the filed P-31 rate and that it was meant to change, upward or downward, with any changes in the P-31 rate on file with the California Commission, Mr. Sutherland, at the Reno meeting, asked Mr. Tracy if he understood this. He was assured by Mr. Tracy that he did so understand (Supp. App. R. 3140, 2820-2 2822, 28 2896). On two later occasions also, Mr. Tracy acknowledged to Mr. Sutherland that this was Sierra's understanding of the contract (Supp. App. R. 3140-3141, 2837, 2896; Tr. 895-896, 950-952).

CALIFORNIA COMMISSION CHANGES P-31 RATE.

Faced with increased costs during the inflationary postwar years, and faced with severely mounting costs after the outbreak of the Korean War in 1950, Pacific in 1951 applied to the California Commission for general rate relief on its electric business.[7]

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[6] For example, the rate provision in the Coast Counties Gas & Electric Company contract executed August 26, 1947, read as follows:

> "The rates and charges to be paid by Coast Counties for electric energy and service furnished hereunder shall be as set forth in Pacific's resale Schedule P-31, a copy of which is attached hereto and made a part hereof."

Substantially the same reference to the P-31 rate appeared in the contracts executed with Pinole Light & Power Company, Vallejo Light & Power Company, and Bay Point Light & Power Company, the other private utility companies that accepted the P-31 rate.

[7] The parties had assumed that the California Commission had jurisdiction over the Sierra contract (Supp. App. R. 901-904). The contract itself provided that the agreement would not be effective

At the hearing in the rate case, Sierra contended that an increase in the P-31 rate was not justified (R. 1788). It also contended that, if an increase were found to be justified, the Commission should allow Sierra to "negotiate" with Pacific for an increased rate rather than merely order the rate increased to make it conform with any increase ordered in the P-31 rate (R. 1788; Tr. 452-453).

After considering the evidence and finding that costs of generating electricity had risen greatly (Tr. 1755-1756), the Commission ordered a general increase in virtually all of Pacific's electric rates (R. 1794). The Commission found that Pacific's resale revenue, including that from Sierra, was roughly 35% below the cost of service and determined that the P-31 rate should be raised substantially to restore Pacific's former return under it and thus prevent an "unreasonable burden on other customers" caused by a continuance of the rate at the old level (R. 1788). The P-31 rate, as raised by the Commission, was then redesignated Schedule "R" (R. 1788).

With respect to the Sierra contract and some other P-31 rate contracts, the Commission noted the request for renegotiation of these contracts[8] and made the following statement concerning the request:

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until approved by the California Commission and that it was subject "at all times" to changes and modifications by the California Commission. This provision in the contract was as follows:

> "12. This agreement shall become effective as of January 1, 1948, upon the procurement of an order of the Public Utilities Commission of the State of California authorizing the parties hereto to carry out the terms and conditions hereof. This agreement shall at all times be subject to such changes and/or modifications as said Commission may from time to time direct in the exercise of its jurisdiction." (R. 1558)

[8] A number of public agencies that had contracts using the P-31 rate joined in Sierra's request. Others with such contracts did not join the request, and their rates were increased to Schedule R. by the Commission. (Tr. 408, 1298; Supp. App. R. 2429.)

> "It is obvious that underlying costs have increased since these contracts were negotiated. Since, by this decision, a new basic resale schedule [Schedule "R"] is being adopted, opportunity should be afforded for renegotiation of these contracts in the light of the new basic resale schedule." (R. 1789; 96 P.U.R. (N.S.) at 526).

In other words, the Commission did not agree with Sierra's contention that the P-31 rate and its own should not be increased. But it granted Sierra's request that it be allowed time to "negotiate" an increased rate to reflect increased costs, such negotiation to be conducted, however, "in light of" the newly authorized Schedule R.

SIERRA'S REFUSAL TO NEGOTIATE.

Despite the granting of its request to negotiate, Sierra refused to do so ([redacted] Supp. App. R. 389-390, 425-426, 451; Tr. 222). Sierra took the position that the Commission did not directly order it to negotiate and that negotiation was therefore not necessary (Supp. App. R. 390; R. 958; Tr. 1183-1184). [redacted] It thus repudiated, not only its representation to the California Commission, but also Mr. Tracy's representation to Mr. Sutherland that he understood and agreed that the rate in the contract, being the filed P-31 rate, would change, upward or downward, with changes in the filed P-31 rate, such as the California Commission had just ordered (Supp App. R. 3140-3141, 3143).

ENFORCEMENT ATTEMPT BEFORE CALIFORNIA COMMISSION.

To enforce its agreement with Sierra, as well as to seek redress for Sierra's repudiation of its offer to "negotiate," Pacific filed a formal petition on January 20, 1953, asking the California Commission to directly order the Sierra rate increased to the new Schedule R.[9]

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[9] Application No. 34029, Calif. P.U.C. (Supp. App. R. 29, 1904, 2839-2840; Tr. 7; R. 2585).

Before the Commission could act on PG&E's request, the case of *United States v. Public Utilities Commission of California,* 345 U.S. 295 (April 6, 1953) was decided. By this case it was established that the Federal Power Commission had exclusive jurisdiction over combined intrastate and interstate power sales such as those being made under the Sierra contract.

Accordingly, the proceeding before the California Commission to enforce the Schedule R rate in the Sierra contract could no longer be pursued.

ENFORCEMENT ATTEMPT BEFORE F.P.C.

Before the decision in *United States v. Public Utilities Commission of California, supra,* the parties to the contract had always acted on the assumption that the California Commission had jurisdiction and would control Pacific's sales to Sierra [illegible] 901-902).[10] The F.P.C. was regarded as having only concurrent jurisdiction at best. The practice of the parties was to have the contract approved in the regular manner by the California Commission and then forwarded to the F.P.C. The F.P.C. would treat the forwarding as the "filing" of a rate and give the contract a schedule number (Tr. 36-3. Thus, the 1923 contract had been filed by the F.P.C. and had been designated as "Rate Schedule F.P.C. No. 1" (R. 2609; Supp. App. R. 193). The 1938 contract, when similarly filed, was designated "Rate Schedule F.P.C. No. 2" (R. 2609; Supp. App. R. 195-196). The 1948 contract when filed was designated by the Commission as "Rate Schedule F.P.C. No. 3" (R. 2609; Supp. App. R. 197-198).

It is of passing interest to note that, in accepting these "rate filings," the F.P.C. expressly refrained from "approving" either the contract or the rate. For example, when the 1948 contract was accepted for filing, the F.P.C. expressly disclaimed that it was approving, or even recognizing the existence of, any "contractual right" to have the rate in question continue (Supp. App. R. 2898).

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[10] The California Commission had also assumed this was the law, as shown by its letter of March 25, 1953 to the F.P.C. (Supp. App. R. 1904).

When Sierra repudiated its representation to the California Commission and to Pacific and refused to negotiate a higher rate in the light of the new resale Schedule R, Pacific, in view of the uncertainty created by the pendency of *United States v. Public Utilities Com'n, supra,* (Supp. App. R. 29), also invoked the aid of the F.P.C. for enforcement of its agreement with Sierra. Thus, two weeks after it had asked the California Commission to act to enforce the Schedule R rate, Pacific, on February 2, 1953, filed the Schedule R rate with the F.P.C. as a new rate to be applied to the Sierra service under § 205 of the Federal Power Act (R. 2553-2554, 212 This new rate was designated "Supplement No. 1 to Rate Schedule F.P.C. No. 3." (R. 2553.)

In filing this Supplement No. 1 rate with the F.P.C., Pacific was, of course, acting consistently with its agreement with Sierra that an increase would be forthcoming if the P-31 rate were increased by the California Commission. It was also acting, of course, in the belief that § 205 of the Federal Power Act was the proper procedure to follow with respect to the Sierra service.

The Commission, on its own motion under § 205(e), suspended the effectiveness of the newly filed rate and ordered a hearing as to its reasonableness ([redacted] R. 2090). Sierra was then granted leave to intervene (Supp. App. R. 2162).

Before the F.P.C., Sierra took a position that was quite different from its expressed understanding at the time the contract was entered into (Supp. App. R. 3140-3142) and quite different from its testimony before the California Commission at the time the parties sought authorization for the contract (pp App. 2424-426; R. 1673-1683). It now contended before the F.P.C. that the rate used for the contract was meant to be "fixed" for the entire life of the contract (Tr. 31-3 665). It asserted that intense competition had existed between Pacific and the U. S. Bureau of Reclamation and that, in order to forestall competition from the Bureau, Pacific had offered Sierra a long-term contract with a special low rate fixed for the life of the contract (Supp App. R. 2333-2334).

Pacific pointed out that this was not so (Tr. 15- Pacific's position was, as it has always been and still is, that the parties did not intend the rate to be fixed for the life of the contract, that the parties had always understood the rate was meant to be the filed P-31 rate, and that it was meant to be changeable whenever the P-31 rate was found to be unreasonable, as the California Commission had just found (Supp. App. R. 2420-2423). Pacific pointed out that the sole reason for the long term of the contract was to protect the investment in new transmission facilities required under the contract—as Sierra's president, Mr. Tracy, had testified before the California Commission in 1948 (R. 1675)—not to fix the rate for a long period of time because of a supposed competitive condition (Supp. App. R. 2424-2428). Pacific also pointed out that the supposed competitive situation was in reality nonexistent—as Mr. Tracy had conceded before the California Commission when he testified in 1948 that no other source of power would be available in time to meet Sierra's needs (R. 1674). Pacific's entire closing brief before the Commission was, in fact, devoted to rebutting Sierra's contention that the rate in the contract was meant to be "fixed" for the life of the contract (Supp. App. R. 2415-2442).

Despite the evidence and argument devoted to the question, the Commission did not decide the issue. Instead, it simply ruled that *any* rate, even a "fixed" rate such as Sierra claimed it had, could be changed under § 205 (R. 2598-2605; 7 P.U.R. 3d at 265-269).

After making this ruling of law, the Commission went on to find, as had the California Commission, that costs of generating electricity had greatly increased since 1948 and that an increase in the rate for the Sierra service was necessary to restore Pacific's return on the Sierra service. After finding that the new rate filed by Pacific would "merely restore" Pacific's former return on the Sierra service and "not go above it" (R. 2592; 7 P.U.R. 3d 262), and that this return was "reasonable" (R. 2588-2598; 7 P.U.R. 3d 260-265), the Commission on June 17, 1954, permitted the new rate to go into effect (R. 2607-2611).

APPEAL OF COMMISSION'S RULING OF LAW.

In its appeal to this Court, Sierra argued that a fixed-rate contract entered into to forestall competition—the kind of contract it claimed to have—could not be changed under § 205. The Commission's contrary ruling, Sierra asserted, was error.

This Court then ruled upon the question of law thus presented—namely, whether a contract such as Sierra claimed to have could be changed in a § 205 proceeding.

In the words of this Court, the question of law posed was as follows:

> "The novel and important question is whether and to what extent the pre-existing right of utilities to enter into enforceable rate contracts has been abrogated by the Commission's power under the Act to regulate rates." (96 App. D.C. at 141, 223 F.2d at 606)

The same question of law was decided by the Supreme Court. That court stated the question as follows:

> "The first question before us is whether P.G.&E.'s unilateral filing of the new rate under § 205(d), and the approval of the new rate by the Commission under § 205(e), were effective to supersede P.G.&E's contract with Sierra." (350 U.S. at 353.)

Both this Court and the Supreme Court ruled that the Commission erred in ruling that a contractual right to a fixed rate (such as Sierra contended it had) could be abrogated in a § 205 proceeding. Both courts held that a rate so fixed could be changed only in a § 206 proceeding.

The Supreme Court further held that such a rate could be changed in a § 206 proceeding only if it were "so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon others an excessive burden or be unduly discriminatory." (350 U.S. at 355.) If such a finding had been made by the Commission, the Supreme Court said, "the Commission's order here could have been effective" because "it would seem immaterial" that the Commission's investigation had started under § 205 rather than § 206. (350 U.S. at 353.) The Court went on to note that whether the rate "is so low as to have an adverse effect on the public interest is, of course, a question to be decided in the first instance by the Commission." (350 U.S. at 355.)

After thus pronouncing the law applicable to the Commission's ruling that fixed rate contracts could be changed under § 205, the Supreme Court ordered the case remanded "for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable." (350 U.S. at 355.)

F.P.C. PROCEEDINGS AFTER REMAND.

After the remand, Pacific asked the Commission to determine whether the existing Sierra rate was "so low as to adversely affect the public interest" according to the standard laid down by the Supreme Court for a § 206 proceeding (Supp. App. R. 2649-2654). It also asked the Commission to determine the question left undecided before—i.e., whether the Sierra contract was in fact one for a fixed rate as Sierra had claimed, or one for a changeable rate as Pacific had claimed—so that it could be determined whether, on the *true* facts, § 205 or § 206 was applicable (Supp. App. R. 2817-2821).

On its part, Sierra filed a complaint with the Commission asking that Pacific be ordered to cease billing Sierra at the rate specified by the Commission's order of June 17, 1954, which had been "set aside" by the appellate courts (Supp. App. 2748-2754.[11]

The matters thus presented were consolidated and time was granted by the Commission to both Pacific and Sierra to make written submissions in accordance with §§ 1.15-1.17 of the Commission's Rules of Practice—sections relating to pleadings—as to the factual and legal bases for their respective contentions (Supp. App. R. 2810-2812). The last of these was filed December 10, 1956 (Supp. App. R. 3064).

With respect to its contention that the rate was "so low as to adversely affect the public interest," Pacific in its submission alleged facts which, if proven, would show that Pacific's earnings had dropped so far on the Sierra service since 1948 that Pacific was actually incurring an "out-of-pocket" loss—in other words, Pacific would save money

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[11] Pacific had continued this billing in the belief that, until the Commission acted on the remand and changed the last rate ordered into effect by the Commission, Pacific had no choice but to obey the last ordered rate under the authority of *Montana Dakota Util. Co. v. Northwestern P.S. Co.*, 341 U.S. 246, 251 (1951). (Supp. App. R. 2885.)

if it were able to give up serving Sierra and abandon the expensive transmission facilities built for the service[12]
- 2909; (Supp. App. R. 2899, [redacted] 2865-2873). Other customers, Pacific argued, would necessarily have to make up for this out-of-pocket loss (Supp. App. R. 2869-2873). Moreover, alleged Pacific, the rate was unduly discriminatory against Pacific's only other interstate customer, the California-Oregon Power Company, which was buying power from Pacific under an F.P.C. rate (equivalent to Schedule R) that was approximately 22% higher than Sierra's rate
- [illegible]) (Supp. App. R. 2880)—and this despite the fact that the Commission had found that costs of serving that Company were actually less than the costs of serving Sierra (R. 2596-2597; Supp. App. R. 2880-2881).

Although Pacific was merely petitioning the Commission to allow Pacific to establish these facts by proper testimony and evidence in reopened proceedings, the Commission refused to reopen the proceedings and hear the evidence.

On July 10, 1957, after the request had been submitted for a full seven months, the Commission ruled rather enigmatically that all Pacific was offering to show was that the 1948 rate "may or may not * * * cast an excessive burden upon other of P.G.&E.'s electric utility customers,[13] be unduly discriminatory, or otherwise adversely affect interests of public concern," the general test laid down by the Supreme Court for a § 206 proceeding (Supp. App. R. 3078-3079). So saying, the Commission refused to hold a hearing (Supp. App. R. 3081).

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[12] Sierra, in the original proceedings, had acknowledged that such an out-of-pocket loss was against the public interest and would entitle Pacific to a rate increase under § 206 even if Sierra had a fixed-rate contract as claimed (Supp. App. R. 2351-2352, 2353; Tr. 987, 982-983, 33).

[13] The California Commission, it will be recalled, had already found this to be the case. (See p. 12 above.)

With respect to the question whether Sierra and Pacific did in fact agree to a "fixed" rate for their contract, the Commission also refused to hear the issue (Supp. App. R. 3078). In its same order of July 10, 1957, it ruled that the Supreme Court's decision "must be taken as disposing of PG&E's contention concerning the contractual obligation of the parties under the 1948 contract with respect to rates" (Supp. App. R. 3078).

The order of July 10, 1957, after denying Pacific a hearing on both questions, thereupon ordered Pacific to bill Sierra at the old Rate Schedule F.P.C. No. 3 filed in 1948 with the Commission (Supp. App. R. 3081).

INSTANT PETITION TO REVIEW.

Following the order of July 10, 1957, Pacific timely filed an application for rehearing, which was denied by the Commission September 5, 1957. On November 1, 1957, Pacific timely filed the instant Petition to Review.

STATEMENT OF POINTS

I.

The Commission was in error in ruling that the Supreme Court's opinion has precluded it from now deciding whether the parties agreed to a "fixed" or "changeable" rate for their long-term contract.

II.

The Commission's refusal to find whether the existing rate is "so low as to adversely affect the public interest" was arbitrary and capricious, an abuse of discretion, and a denial of due process of law.

SUMMARY OF ARGUMENT

I.

On review of the Commission's original order of June 17, 1954, this Court and the Supreme Court decided that a fixed-rate contract could not be changed under § 205 of the Federal Power Act. They did not decide whether Sierra in fact had such a contract, since the Commission had made no findings on this point. The Commission had simply ruled as a matter of law that *any* rate could be changed under § 205 and that it was therefore immaterial whether or not Sierra had a fixed-rate contract as claimed. In reversing the Commission, this Court and the Supreme Court ruled on the question of law thus presented. They ruled that a rate intended by the parties to be fixed for a term of years by contract could not be changed under § 205. On remand, therefore, the Commission should have decided the issue, left undetermined by it, as to whether the parties in fact had agreed to a "changeable" rate tied to Pacific's P-31 rate on file with the California Commission, as Pacific had contended, or had agreed to a "fixed" rate, as had been claimed by Sierra. Neither the "law of the case" nor "res judicata" precludes the Commission from deciding this issue. The Commission's refusal to decide the issue, on the ground that it is precluded from doing so by the Supreme Court's opinion, is clear error.

II.

The Supreme Court decided that the Commission's original order of June 17, 1954, was invalid because it was based on an erroneous view of the law, and because no finding had been made as to whether the rate was "so low as to adversely affect the public interest" under § 206 of the Federal Power Act. If such a finding under § 206 had been made, the Supreme Court said, "The Commission's order here could have been effective" because it was immaterial that the original proceeding had been started by the Commission as an investigation under § 205 rather than as an investigation under § 206. But, said the Supreme Court, "Whether under the facts of this case the contract rate is so low as to have an adverse effect on the public interest is of course a question to be determined in the first instance by the Commission." It then ordered the case remanded to the Commission for further proceedings. On remand, the Commission refused to hold a hearing on this new issue and made no finding on it. Instead, without any hearing, it merely stated its conclusion that the existing rate "may or may not" be against the public interest and then terminated the entire rate case. The Commission's failure to hold a hearing, take evidence and make a finding one way or another on the new issue was arbitrary and capricious, an abuse of discretion, and a denial of due process.

ARGUMENT

I.

THE COMMISSION SHOULD NOW DECIDE WHETHER THE PARTIES AGREED TO A "FIXED" OR "CHANGEABLE" RATE FOR THEIR LONG-TERM CONTRACT.

(a) The Supreme Court did not decide the question.

In its order of July 10, 1957, the F.P.C. held that the Supreme Court's decision must be taken as "disposing of" the question whether the parties had in fact agreed to a "fixed" rate for their long-term contract (Supp. App. R. 3078).

As we have seen, however, neither the opinion of the Supreme Court nor that of this Court purported to decide this question.[14] Indeed, it would have been improper for them to do so. In the absence of findings on the issue by the Commission, the question whether the parties agreed to a "fixed" rate for a 15-year minimum term, as Sierra claimed, or agreed to a "changeable" rate tied to Pacific's P-31 rate on file with the California Commission, as Pacific claimed, was a matter for decision in the first instance by the Commission.

See, *e.g.*:

> *City of Lancaster, Ohio v. F.P.C.*, 102 App. D.C. 250; 252 F.2d 631, 633 (D.C. Cir. 1957). (Case remanded to Commission to make findings whether there was a rate contract and, if so, what its terms and conditions were);
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> *Portsmouth Gas Co. v. F.P.C.*, 101 App. D.C. 99, 103; 247 F.2d 90, 94 (D.C. Cir. 1957). (Case remanded to Commission to find what the terms and conditions of a contract were in view of conclusions to be

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[14] See pp. 17-18 above.

> drawn from "numerous orders and proceedings and perhaps from the conduct of the parties—conclusions which should be made in the first instance by the Commission").

The question that was decided by the Supreme Court and this Court was one purely of law. It arose from a ruling of law made by the Commission.

(b) The Supreme Court and this Court decided only the question of "law" involved in the Commission's ruling.

All that the Supreme Court and this Court decided was the question of law presented by the Commission's ruling that the rate in *any* contract could be changed under § 205. Sierra had argued to the Commission that certain facts existed which showed that the 1948 contract was entered into by the parties to give Sierra the benefit of a long-term contract with a special low rate "fixed" for the life of the contract in order to forestall competition from "cheap" government power which Sierra claimed was available to it and that to permit Pacific to raise the rate under § 205 would, in the face of these facts, be the same as permitting Pacific to unilaterally abrogate the contract. The Commission did not choose to find whether or not these facts actually existed.[15] It assumed for the purposes of its decision that they did exist, but ruled that they were not of legal significance. *Any* rate, the Commission held, could be changed by the filing of an increased rate under § 205, subject to the power of suspension and investigation under § 205(e) (R. 2599-2602).

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[15] As we have noted, Pacific had taken issue with these asserted facts. It had argued to the Commission that facts existed which showed the parties had agreed to use the P-31 rate in the contract and had agreed that the rate in the contract would therefore change, upward or downward, whenever the P-31 rate, on file with the California Commission, was found to be unreasonable, as the California Commission had just found a few months before the initiation of the F.P.C. proceeding. (See pp. 16, 3 above.)

The question decided on review, therefore, was whether the Commission's ruling was correct as applied to the *assumed* facts.[16] To reach this question, both reviewing courts first had to state what the assumed facts were. (See 223 F.2d at 606; 350 U.S. at 351-352.) They then announced the "question" they were deciding. In the words of this Court, the question was stated as follows:

> "The * * * question * * * is whether and to what extent the pre-existing right of utilities to enter into enforceable rate contracts has been abrogated by the Commission's power under the Act to regulate rates." (96 App. D.C. at 141, 223 F.2d at 606.)

In the words of the Supreme Court, the same question was stated as follows:

> "The * * * question before us is whether PG&E's unilateral filing of the new rate under § 205 (d), and the approval of the new rate by the Commission under § 205 (e), were effective to supersede PG&E's contract with Sierra." (350 U.S. at 352-353.)

It is abundantly clear, therefore, that the only question decided by the Supreme Court and this Court was the one announced by them.

With such clear announcements by the Supreme Court and this Court of the "question" being decided by them, why does the Commission now say that the Supreme Court also decided the question as to what kind of rate the parties had actually agreed upon for their contract?

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16. Note *Pacific Gas and Electric Co. v. F.P.C. supra,* 253 F.2d 536, 538 (9th Cir. 1958), where the court said:

> "That court held that a fixed-rate contract (the Commission had assumed this to be such a contract) could be changed only upon a finding by the Commission, pursuant to § 206(a) * * *"

The only reasoning given by the Commission as to why it believed the Supreme Court had "disposed" of this question can be summarized as follows: The Supreme Court decided the case *as though* the parties had agreed to a fixed rate; therefore, it must necessarily have decided that such was actually the fact (Supp. App. R. 3078).

This reasoning by the Commission, however, is plainly in error and shows a very serious misunderstanding by the Commission of the appellate processes to which it is subject.

(c) The Supreme Court handled the case on the assumption that it involved a fixed rate contract because this was the assumption on which the Commission decided the case.

It is a fundamental precept that appellate courts reviewing the action of administrative agencies must "judge the propriety of such action solely by the grounds invoked by the agency" (*S.E.C. v. Chenery Corp.,* 332 U.S. 194, 196 (1947)).

See also:

> *Democrat Printing Co. v. F.C.C.,* 91 App. D.C. 72, 78; 202 F.2d 298, 303 (D.C. Cir. 1952). ("Our review is limited to the reasons which the Commission relied upon for its action.");
>
> *Mississippi River Fuel Corp. v. F.P.C.,* 82 App. D.C. 208, 224; 163 F.2d 433, 449 (D.C. Cir. 1947). ("[W]here the decision of a Commission is explicitly based upon the applicability of certain principles, its validity must likewise be judged on that basis.").
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> *N.L.R.B. v. Capital Transit Co.,* 95 App. D.C. 310, 313; 221 F.2d 864, 867 (D.C. Cir. 1955). ("'The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.'")

And see to the same effect:

In Re Engineers Public Service Co., 168 F.2d 722, 737 (3rd Cir. 1948);

Irvin v. Hobby, 131 F. Supp. 851, 862-863 (N.D. Iowa E.D. 1955);

Amarillo-Borger Express v. U.S., 138 F. Supp. 411, 417 (N.D. Tex. 1956);

Cantlay & Tanzola v. U.S., 115 F. Supp. 72, 81 (S.D. Calif. C.D. 1953);

In re Eastern Minnesota Power Corp., 74 F. Supp. 528, 531 (D. Minn. 1947).

It is quite clear, therefore, why the Supreme Court and this Court decided the case as though Sierra had a fixed-rate contract. As we have seen, the Commission, instead of resolving the dispute over whether Sierra had a fixed-rate contract, ruled as a matter of law that even a fixed-rate contract such as Sierra claimed to have could be changed under § 205. The reviewing courts simply decided the case on the same basis. Since the Commission had assumed for purposes of its decision that Sierra had a fixed-rate contract, the courts assumed the same thing. No significance whatever, therefore, can be attached to the fact that the Supreme Court and this Court wrote their opinions on the assumption that Sierra did in fact have a fixed-rate contract. In doing so, they were merely reviewing the Commission's decision on the Commission's own grounds. The Commission's reasoning that by doing so the courts were deciding whether the parties in fact had a fixed-rate contract is patently erroneous.

(d) There is no "law of the case" as to whether the parties in fact agreed to a fixed rate for the contract.

Sierra in its briefs to the Commission following the remand argued that it is now the "law of the case" that the parties had agreed to a fixed-rate contract and that the Commission, therefore, can no longer look into this disputed question.

It is axiomatic, however, that only those questions actually decided by an appellate court form the "law of the case."

See cases collected at:

3 Am. Jur. 549.

("It will not be presumed that the court adjudicated a question not before it * * * [T]he * * * law of the case * * * applies to questions of law actually presented and determined * * *");

5B C.J.S. 557.

("Matters which were not decided by the appellate court * * * are not within the * * * law of the case * * *").

As we have seen, the Supreme Court and this Court did not purport to decide whether the parties did in fact agree to a fixed rate for their contract. There is, therefore, no "law of the case" expressly covering this issue.

Nor can it be said that the Supreme Court or this Court decided the question by implication as part of its statement of the facts before it reached the express "question" announced for decision. The statement of the facts in an appellate opinion forms no part of the law of the case. It merely provides the "setting" to show what the question of law brought up for decision is.

See, *e.g.*:

Gandia v. Porto Rico Fertilizer Co., 2 F.2d 641 (1st Cir. 1924). ("The opinion referred to facts * * * as distinguished from the question of law * * *, only as a setting to show what the question of law really was.");

Sneed v. Osborn, 25 Cal. 619, 629 (1864). ("Facts are stated, in the opinion of the Court, solely that the course of reasoning adopted by the Court, and the principles enunciated, may be the better understood. The Court does not assume to find the facts in a case * * *.").

See also cases collected at:

5B C.J.S. 568. ("[T]he decision of an appellate court is the law of the case * * * only as to questions of law and not as to questions of fact.").

Thus, on a remand of a case to a lower court for further proceedings, the lower court is free to find that different facts or further facts exist which change entirely the factual circumstances described by the appellate court. Such findings may lead the lower court to reach the same result as it reached before, but on an entirely different basis. The "law of the case" does not bar the lower court from doing this.

See, *e.g.*:

Thane Lumber Co. v. J. L. Metz Furniture Co., 12 F.2d 701, 702-704 (8th Cir. 1926);

Moore v. Trott, 162 Cal. 269, 270-273, 122 Pac. 462, 463-464 (1912);

Union Trust Co. v. Woodrow Mfg. Co., 63 F.2d 602, 605 (8th Cir. 1933);

Washington & Berkeley B. Co. v. Pennsylvania S. Co., 252 Fed. 487, 489 (4th Cir. 1918).

See also cases collected at:

5B C.J.S. 568, 570.

("[T]he decision of an appellate court is the law of the case on a subsequent trial only as to questions of law and not as to questions of fact * * * To render the doctrine of the law of the case applicable on a retrial, . . . the facts on the second trial must be such as to make applicable the points of law decided on appeal.")

These same principles apply essentially to administrative proceedings also.[17] Thus, after a reversal and remand for further proceedings, an administrative agency, like a lower court, is free to make additional findings on the evidence already submitted and may take further evidence on issues which become material in view of the correct law as announced by the reviewing courts. The Supreme Court has made these points quite clear:

> "The purpose of the judicial review is * * * to secure a just result with a minimum of technical requirements * * * [On remand] the case is returned to the administrative body in order that it may take further action in accordance with the applicable law * * * If findings are lacking which may properly be made upon the evidence already received, the * * * evidence [need not] be reheard * * * If further evidence is necessary and

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[17] If anything, administrative agencies are less restricted by technical rules of procedure than are lower courts, which deal only with "adversary" proceedings. Because administrative proceedings are essentially non-adversary and are concerned with protecting "the public interest in * * * essential public services," the Supreme Court has said that there should not be a "wholesale transplantation of [court] rules of procedure, trial, and review" and that these agencies " 'should be not too narrowly constrained by technical rules' ", provided they follow "fundamentals of fair play." (*F.C.C. v. Pottsville Broadcasting Co.,* 309 U.S. 134, 143.)

available to supply the basis for findings on material points, that evidence may be taken."

Ford Motor Co. v. N.L.R.B., 305 U.S. 364, 373-374 (1939).

See also cases collected at:

73 C.J.S. 610.

("Where an administrative decision or order is reversed or vacated and remanded, the case stands as if no decision or order had ever been made, and the administrative body has the right to proceed in a manner not inconsistent with * * * the reversing or vacating decision, and [is] authorized to try the case anew, * * * conduct only a reconsideration or [conduct] a full hearing.")

Accordingly an administrative agency, like a lower judicial tribunal, may on remand make additional findings which lead it to the same decision it reached before, but on a new and correct basis. This is especially true where the new basis for the decision was not previously considered by the agency because of its erroneous view of the law.

See *e.g.:*

S.E.C. v. Chenery Corp., supra, 332 U.S. 194 (1947). (Reversal of Commission for legal error in withholding approval of a plan of reorganization on the ground chosen by the Commission held not to bar Commission from considering case on a different basis on the remand and withholding approval on another ground.)

F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). (Reversal of Commission for legal error in denying application for radio license on the ground chosen by the Commission for its decision held not to bar Commission from denying application on another ground when case was remanded.)

See also discussion in:

Davis, Administrative Law, p. 611.

("[W]hen an agency considers a record involving many issues, decides the case on one ground, and then is met with judicial rebuff on that ground—is the agency then barred from reconsidering the whole case on a new record and deciding on other grounds?")

It is thus quite clear that there is no "law of the case" which prevents the Commission from now deciding whether the parties did in fact agree to a "changeable" rate for their long-term contract.

(e) No principle of "res judicata" bars the issue.

Sierra has also argued that the doctrine of "res judicata" bars any inquiry by the Commission into whether the parties in fact agreed to a fixed rate for their contract. In other words, Sierra argues that the issue is precluded now *even if the courts did not decide it!*

The doctrine of res judicata, however, is inapplicable upon a reversal and remand of a case for further proceedings. In such a situation, the only applicable doctrine governing issues precluded is the "law of the case." This doctrine, as we have noted, bars only those issues actually considered and decided by the appellate court. The principle of res judicata which bars issues not actually considered and decided by the appellate court has no application in such a situation. As is succinctly stated in the Supreme Court's headnote to its decision in *Hartford Life Ins. Co. v. Blincoe,* 255 U.S. 129 (1921):

> "In determining how far a decision of this court reversing a judgment of a [lower] court binds that court on a second trial, the principle of *res judicata,*

> that all that might have been decided is presumed to have been decided, *is inapplicable;* and only those matters which were, not merely presented and argued here, but actually considered and decided by this court, are foreclosed." (First italics by the court.)

See also *Mutual Life Ins. Co. v. Hill,* 193 U.S. 551, 553-554 (1904), where the Court spoke as follows:

> "While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded —even though all are not specifically referred to in the opinion—yet *no such conclusion follows in case of a reversal.* It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than *the questions in terms discussed and decided."* (Emphasis added.)

As can be seen, therefore, the doctrine of res judicata relied upon by Sierra can have no application to the present case.

Sierra's argument, however, does not seem limited to the technical doctrine of res judicata. In essence, Sierra seems to think that Pacific should have persuaded the Supreme Court and this Court to decide the issue, left undecided by the Commission, as to whether the parties in fact agreed to a fixed rate and that Pacific should be penalized for failing to do this. In short, Sierra seems to argue that if the Commission erred in not determining whether the parties had a fixed-rate contract, Pacific should have asked this Court or the Supreme Court to correct the error.

This attitude of Sierra's displays a fundamental misunderstanding of the appellate process. There are at least four separate reasons why Pacific could not do what Sierra suggests it should have done.

In the first place, Sierra, not Pacific, was the party appealing from the original proceeding. Pacific had been granted the rate increase it sought, was not a "party aggrieved," and thus had no standing to appeal (Federal Power Act § 313, 49 Stat. 851, 16 U.S.C. § 825*l*). At the outset, therefore, it is to be noted that Pacific cannot be penalized for failing to take an appeal it could not take to correct errors committed by the Commission.

In the second place, Pacific, on Sierra's appeal, could not raise its own specification of error. As the non-appealing party, it could only meet the errors complained of by Sierra (*Landram v. Jordan,* 203 U.S. 56, 62 (1906); *F.T.C. v. Pacific Paper Ass'n,* 273 U.S. 52, 66 (1927)) and seek to support the Commission's action "on the grounds invoked by the agency" (*S.E.C. v. Chenery Corp., supra,* 332 U.S. 194, 196 (1947)).[18] Again, therefore, Pacific cannot be penalized because it was obliged to support the Commission's ground of decision rather than argue that the Commission should have decided the case on another ground.

In the third place, neither this Court nor the Supreme Court could properly be asked by Pacific to decide whether the parties had in fact agreed to a fixed-rate contract. The evidence on this point was conflicting, and the Commission had made no findings on it. As we have noted, reviewing courts do not make findings for administrative agencies but only review findings made by them. (*Connecticut Light & Power Co. v. F.P.C.,* 324 U.S. 515, 534 (1945); *City of Lancaster, Ohio v. F.P.C., supra,* 102 App. D.C 250,252; 252 F.2d 631, 633 (D.C. Cir. 1957); *Portsmouth Gas Co. v. F.P.C., supra,* 101 App. D.C. 99, 103; 247 F.2d 90, 94 (D.C.

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[18] See also authorities cited at pp. 28-29 above.

Cir. 1957).) Here too, Pacific cannot be penalized for not asking this Court and the Supreme Court to make findings which they could not properly make on the conflicting evidence.

In the fourth place, even if Pacific had urged this Court and the Supreme Court to affirm the Commission's action on the ground that the parties had not in fact agreed to a fixed rate, the courts could not have done so. As we have seen (pp. 28-29 above), a reviewing court can review only "the grounds invoked by an agency" in support of its action (*S.E.C. v. Chenery Corp., supra,* 332 U.S. 194, 196 (1947)).

See also:

> *Boudin v. Dulles,* 98 App. D.C. 305, 308; 235 F.2d 532, 535 (D.C. Cir. 1956). ("An administrative order 'cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.' ")
>
> *Optical Workers' Union v. NLRB,* 227 F.2d 687, 690 (5th Cir. 1955). ("[W]here an administrative agency sets forth improper grounds for its decision, 'the court is powerless to affirm * * * by substituting what it considers to be a more adequate or proper basis.' ")

Here also, Pacific cannot be penalized because this Court and the Supreme Court reviewed only the grounds upon which the Commission rested its action.

It is abundantly clear, therefore, that the doctrine of "res judicata" does not bar any issues not actually decided by this Court and the Supreme Court in their earlier review. It is also clear that Pacific is in no sense to be penalized or condemned because a particular issue, left undecided by the

Commission, was also left undecided by both this Court and the Supreme Court. Pacific has since the very inception of the initial proceeding before the F.P.C. done all it properly could do to have the tendered issue heard and decided, and is still doing all it can toward that end.

(f) The Commission must now decide the issues which it has so far left undecided.

As we have seen, the reviewing courts left undecided all issues which the Commission did not rule upon originally. Error having been found in the one ground chosen by the Commission for its decision, the case was remanded to the Commission for further consideration. This was in accordance with fundamental procedure in reviewing administrative action. As the Supreme Court has so clearly said:

> "[T]he guiding principle * * * is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration."
>
> *F.P.C. v. Idaho Power Co.,* 344 U.S. 17, 20 (1952).

See also:

F.C.C. v. Pottsville Broadcasting Co., supra, 309 U.S. 134, 145 (1940). ("The Court of Appeals laid bare that error, and * * * exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application * * *")

I.C.C. v. Clyde Steamship Co., 181 U.S. 29, 32 (1901). ("[W]here the commission by reason of its erroneous construction of the statute * * * declined to adequately find the facts, it was the duty of the court * * * to correct the error of law committed by that body, and after doing so to remand the case to the commission so as to afford it the opportunity of examining the evidence and finding the facts * * *")

After the remand, the Commission was bound to deal with the case anew, performing its statutory duty of enforcing, for the public good, the regulatory statute committed to its care. It was obliged to decide the case on a proper basis "not inconsistent" with the law announced by the Supreme Court. In other words, the error of law made earlier was not to be repeated. But except for this limitation the Commission, in protecting the public interest, was bound to deal with the problem afresh, weighing again all pertinent points involved in the case—especially those not considered before "by reason of its erroneous construction of the statute" (*I.C.C. v. Clyde Steamship Co., supra,* 181 U.S. 29, 32 (1901)). Only in this way could the Commission properly perform its paramount function of safeguarding the public interest in "essential public services" (*F.C.C. v. Pottsville Broadcasting Co., supra,* 309 U.S. 134, 143 (1940)). As the Supreme Court has said:

> "After the remand was made * * * the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress * * * Only in that way could the legislative policies embodied in the act be effectuated."
>
> *S.E.C. v. Chenery Corp., supra,* 332 U.S. 194, 201 (1947).

See also:

F.C.C. v. Pottsville Broadcasting Co., supra, 309 U.S. 134, 145 (1940). ("[J]udicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.")

Ford Motor Co. v. NLRB, 305 U.S. 364, 374 (1939). ("The 'remand' does not encroach upon administrative functions.")

Thus, it was plainly the duty of the Commission to decide the pertinent question, left undecided by it before, as to whether the parties agreed to a "fixed" or a "changeable" rate for their long-term contract. Not only was the Commission free to consider this issue on the remand, but its statutory duty under the Federal Power Act required it to do so.

We submit, therefore, that the Commission's ruling that it could not consider this question because the Supreme Court "disposed of" the question was clearest error.

II.

THE COMMISSION SHOULD NOW DECIDE WHETHER THE EXISTING RATE IS "SO LOW AS TO ADVERSELY AFFECT THE PUBLIC INTEREST."

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."
>
> —Mr. Justice Brandeis, *Chicago Junction Case,* 264 U.S. 258, 265 (1923).

The original rate proceeding in this case was one initiated on the Commission's own motion. It was, by any standard, a "full blown" rate hearing. It lasted 14 days, covered nearly 1500 pages of transcript, and required over 600 pages of exhibits. After all the evidence was in, the Commission issued an order allowing Pacific a rate increase. Later this order was declared invalid by the Supreme Court, because based on an erroneous view of the law and because no finding had been made whether the rate was "so low as to adversely affect the public interest" (350 U.S. at 355).

After the remand, Pacific asked the Commission to find whether the existing rate was "so low as to adversely affect the public interest" (Supp. App. R. 2649-2654). In support of this request, Pacific filed with the Commission certain "submissions" intended to show the nature of further evidence which Pacific thought would be pertinent to the Commission's inquiry on this issue. In response, the Commission, in a rather abrupt and astounding fashion, has refused to hear any evidence on this new issue or make any findings on it. Despite the full record which the Commission had earlier felt gave an adequate basis for findings, the Commission now finds that this very same record—even if augmented by further hearings—is insufficient to determine whether the rate in question does or does not adversely affect the public interest under the standard laid down by the Supreme Court.

It is this callous refusal to determine the facts of this case that petitioner asks this Court to correct.

Our indictment of the Commission is a severe one. It is fully warranted, however, by the plain facts of the record. Let us examine that record more closely. Just what did the Commission do—or, rather, fail to do? Instead of finding the facts either one way or another, the Commission merely fence-straddled. It finds that the cost of rendering service to Sierra at the existing rate *"may or may not* * * * cast an excessive burden upon other of PG&E's electric utility customers, be unduly discriminatory, or otherwise adversely affect interests of public concern; the *ultimate* fact to be ascertained." (First emphasis added. Supp. App. R. 3079.) This, indeed, is a puzzling statement for the Commission to make. Obviously the *ultimate* fact, as to whether a rate is or is not against the public interest, is for the Commission to find!

And what explanation does the Commission give for its enigmatic statement? The Commission attempts to explain it by a further puzzling and meaningless statement. It says that, on their face, all that Pacific's proffered facts show is that the Sierra service is "somewhat less profitable to PG&E now than when the rate was negotiated" (Supp. App. R. 3079). What an astonishing statement! Even a heavy loss is "less profitable" than before. The phrase "less profitable" tells nothing. The question is *how much* less profitable the rate is now than in 1948.

Pacific had offered to prove to the Commission that the service was so much "less profitable" that it was actually incurring an out-of-pocket loss which would amount to

$11,000,000 for the period from 1952 through 1971 (Supp. App. R. 2899-2909; [redacted] 2865-2873).[19] In other words, the service was not only "less profitable" but was worse than profitless, requiring a subsidy from other revenues in order to continue. The Commission, noting Pacific's point, concedes that the "cost of rendering the Sierra service exceeds revenues therefrom" (Supp. App. R. 3079). Yet the Commission refuses to determine the *degree* of the discrepancy between costs and revenues. If the service is "less profitable" than before, says the Commission, the rate "may or may not" be against the public interest, but the Commission refuses to find which it is.

As will be seen from reading the Commission's order of July 10, 1957, all the Commission really did was criticize Pacific's pleadings.[20] With respect to the revenue deficiency studies which Pacific proposed to make for the Commission's evaluation and expert appraisal as to the degree of loss occurring, the Commission criticized these as being merely evidentiary pleading, and not pleading of "ultimate" facts (Supp. App. R. 3079). With respect to Pacific's offer to demonstrate that the low revenue produced from the rate causes an increase in Pacific's cost of money, a cost that must obviously be borne ultimately by all Pacific's customers, Pacific was criticized because it did not offer particular "testimony" in support of "this allegation" (Supp. App. R. 3079). As to the obvious locality discrimination[21] existing between the rate to Sierra and the 22% higher rate being charged Pacific's only other interstate customer, California-Oregon Power Company, a service costing Pacific one-seventh less to provide (R. 2596-2597), the Commission again makes the same kind of criticism of the particular type of evidence offered, instead of giving Pacific the opportunity to provide evidence the Commission deems proper.[22]

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[19] Even Sierra has acknowledged that an out-of-pocket loss suffered by Pacific (*i.e.*, where it would save money by abandoning the Sierra service) would be against the public interest. (Supp. App. R. 2351-2352, 2333; Tr. 987, 982-983, 33).

[20] Pacific had offered to establish that the existing rate was against the public interest under two of the tests laid down by the Supreme Court, *viz.*, (1) that the existing rate was so low that it "cast upon others an excessive burden." and (2) that it was so low as to be "unduly discriminatory." (See 350 U.S. at 355.) The offer to prove these *ultimate* facts was contained in written "submissions"—in other words, pleadings—which were presented to the Commission under its Rules of Practice (18 C.F.R. §§ 1.15-1.17; Supp. App. R. 2810-2812).

It will be noted that nowhere does the Commission find that Pacific's factual contentions are not true. Indeed, as we have said, the Commission makes no findings at all.[23] It criticizes pleadings, but nowhere exercises its expert judgment. And, of course, it exercises no expert judgment because it gave itself no opportunity to do so: It never permitted the presentation of pertinent evidence and testimony upon which it could bring its expert judgment to bear. All it did was reject pleaded facts as inexpertly pleaded. And it even rejected them on inconsistent theories: One allegation is criticized as being a subsidiary, not an ultimate fact. Yet when ultimate facts are pleaded, these are criticized because not enough subsidiary facts are shown. The unavoidable impression gained is that the Commission simply did not wish to hear the case and arbitrarily refused to do so.

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[21] § 205 of the Federal Power Act provides that "No public utility shall * * * maintain any unreasonable difference in rates * * * either as between localities or classes of service." For authority that Pacific's allegations showed such a prohibited locality discrimination, see *California Portland Cement Co. v. Public Utilities Com'n*, 49 Cal. 2d 171, 315 Pac. 2d 709 (1957), a case construing an almost identical provision of the California Public Utilities Code.

[22] It should be noted that Sierra now enjoys by far the lowest resale rate on Pacific's entire system. All the other resale customers that were formerly served under the P-31 rate are now being served under Schedule R or its equivalent. (Supp. App. R. 2552-2583;

[23] That the Commission's order must be supported by findings of fact is, of course, clear. (*Mississippi River Fuel Corp. v. F.P.C.*, *supra*, 82 App. D.C. 208, 163 F.2d 433, 439 (1947).)

cf. Tr. 1298, 408, 455-457, 597-599).

Without burdening this Court with details, suffice it to say that a reading of Pacific's submissions on its pleaded points, and a glance at the Commission's strange discussion of these points in its order of July 10, 1957, will show that the Commission did not even attempt to come to grips with them. (See Pacific's Petition for Rehearing before the Commission, Point II, discussing the Commission's order in some detail and pointing out its complete lack of responsiveness to the points pleaded by Pacific (Supp. App. R. 3127-3133).)

The end result is that the Commission's only finding, if it can be called that, is that the 1948 rate *may or may not* adversely affect the public interest. Certainly the termination without further action of a full rate case with a finding that the rate under examination *may in fact adversely affect the public interest within the very standards just laid down by the Supreme Court* is an inexcusable failure of action on the part of an administrative body. It is abritrary and capricious in the extreme, a clear abuse of discretion, and a gross violation of fundamental principles of due process.

As Mr. Justice Cardozo said in *Ohio Bell Tel. Co. v. Public Utilities Comm'n,* 301 U.S. 292, 304-305 (1937):

> "The right to such a hearing is one of 'the rudiments of fair play' * * * assured to every litigant by the Fourteenth Amendment as a minimal requirement * * * There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

Here the Commission has refused even to hear pertinent evidence so it can make up its mind whether the rate in question is so low that it does adversely affect the public interest within the Supreme Court's standard. There can be no doubt that such a refusal to hear evidence violates the fundamental elements of fair play and due process. As Judge Frank has stated:

> " 'The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, while omitting to inform itself and by acting ignorantly when intelligent action is possible * * *'."
>
> *Isbrandtsen Co. v. U.S.*, 96 Fed. Supp. 883, 892 (S.D. N.Y. 1951).

Insofar as the Commission has also refused to hear new evidence, our case finds a parallel in *Jacobsen v. N.L.R.B.*, 120 F.2d 96 (3d Cir. 1941). There the Board originally assumed it had jurisdiction because interstate commerce was affected. (Just as in our case the F.P.C. assumed that the issue in the case was whether the proposed higher rate was "reasonable" under the standards of § 205.) Later, however, the agency reversed itself and ruled that, "[T]he facts * * * are not sufficiently developed to afford a basis for determining whether * * * the operations of the respondent affect [interstate] commerce * * *," (120 Fed. 2d at 100) and dismissed the case.

In view of the reversal by the agency causing a new issue on jurisdiction to become determinative (similar to the reversal by the Supreme Court in our case causing a new issue under § 206 to become determinative), the petitioner filed a petition with the agency (as we did) to reopen the case and to take further testimony on the new issue. When this was denied (as also happened in our case), the petitioner filed a petition with the Court of Appeals (as we have also done) to set aside the Board's order and to direct the Board to take further testimony on the new issue. The Court said:

> "The petitions by which leave was sought to take additional evidence upon this issue are inartistically drawn and, as we have stated, do not set forth the specific testimony relied on. These petitions were presented to the Board only after that tribunal had reversed the position taken by it in its original decision and order (which in effect held that the operations did affect [interstate] commerce). We conclude that there was no sufficient reason for the Board to refuse to receive additional testimony upon the issue of interstate commerce and that its refusal to do so was an abuse of discretion." (120 Fed. 2d at 101)

To the same effect are the cases of *N.L.R.B. v. Burns,* 207 F.2d 434, 436 (8th Cir. 1953); *N.L.R.B. v. Tennessee-Carolina Transportation Co.,* 226 F.2d 743 (6th Cir. 1955); and *Forrester Box Co. v. Commissioner of Internal Revenue,* 123 F.2d 225 (8th Cir. 1941).

We respectfully submit that the law, the facts, and fundamental concepts of fair play and due process dictate that this Court set aside the Commission's order of July 10, 1957, and direct the Commission to reopen the proceedings, hold a hearing and make findings whether the existing rate for the Sierra service is in fact "so low as to adversely affect the public interest," as the Commission recognizes it *may* be.

CONCLUSION

The Commission was in error in ruling that the Supreme Court's opinion has precluded it from now deciding whether the parties agreed to a "fixed" or "changeable" rate for their long-term contract.

The Commission's refusal to find whether the existing rate is "so low as to adversely affect the public interest" was arbitrary and capricious, an abuse of discretion, and a denial of due process of law.

It is submitted, therefore, that the Commission's order of July 10, 1957, should be set aside and the relief prayed for in the Petition to Review should be granted.

Respectfully submitted,

F. T. Searls
Robert E. May
Attorneys for Petitioner

Of Counsel:

Frederick W. Mielke, Jr.
Malcolm A. MacKillop
Roger J. Nichols

May, Shannon and Morley

Dated: December 17, 1958

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petitioner's Brief upon all parties of record in this proceeding by mailing a copy thereof, properly addressed and postage prepaid, to each of such parties or its recorded counsel as follows:

Howard E. Wahrenbrock, Solicitor
Federal Power Commission
441 G Street, N. W.
Washington 25, D. C.

Lawrence A. Baker, Esquire
William C. Chanler, Esquire
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York 5, New York

....

Attorney for Petitioner
Pacific Gas and Electric Company

December ...., 1958.

(Appendix follows)

*Appendix**

In the United States Court of Appeals
For the Ninth Circuit

No. ....

Pacific Gas and Electric Company,
Petitioner,
vs.
Federal Power Commission,
Respondent.

Petition to Review and Set Aside Order of the Federal Power Commission and to Take Further Evidence

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To the United States Court of Appeals for the Ninth District and the Honorable Justices thereof:

Pacific Gas and Electric Company (hereinafter called "Pacific"), being aggrieved by the order issued by the Federal Power Commission on July 10, 1957, in the consolidated proceedings bearing said Commission's Docket Nos. E-6482 and E-6697, does hereby respectfully petition this Court, pursuant to Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U.S.C. 825 l) for a review of said order of said Commission and for leave to adduce additional evidence and respectfully shows as follows:

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*Does not include matter printed in Joint Appendix in case No. 12.430 or matter which will be printed in the Supplemental Joint Appendix in the present case, No. 14,422. (See this Court's order of October 24, 1958.)

History and Nature of Administrative Proceedings Sought to Be Reviewed

1. Pacific is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of California authorized to conduct and conducting business in that State and is a "person" and "public utility" within the meaning of and as defined in the Federal Power Act.

2. The Federal Power Commission (hereinafter called "F.P.C.") is the administrative body entrusted with the administration of the Federal Power Act.

3. Sierra Pacific Power Company (hereinafter called "Sierra") is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Maine, duly authorized to conduct and conducting a public utility business in the State of Nevada and portions of the State of California.

4. On the 27th day of April, 1948, the Public Utilities Commission of the State of California authorized Pacific and Sierra to carry out the terms and conditions of a contract, dated March 4, 1948, covering the sale by Pacific to Sierra of all of the electric energy which Sierra requires for resale to its customers and for use in the conduct of its electric business, except such energy as Sierra might generate from its then existing generating plants and purchase from others under minor standby and exchange agreements. The term of said contract was to and including December 31, 1964, or fifteen (15) years after the operative date of a 110 volt transmission line to be constructed by Pacific to serve Sierra's growing load. Said contract, by its terms, was expressly made subject to change or modification by the California Commission. The basic rate specified in said contract was Pacific's standard resale rate, Schedule P-31, then on file with the California Commission.

5. Following the authorization of said contract by the California Commission, it was filed with the F.P.C. as Pacific's Rate Schedule F.P.C. No. 3.

6. On or about February 2, 1953, Pacific filed with the F.P.C., in accordance with the provisions of Section 205(d) of the Federal Power Act, an increase in rates for service to Sierra. These increased rates were known and designated as Pacific's Rate Schedule F.P.C. No. 3, Supplement No. 1. Said filing was for the purpose of applying to the Sierra service the increased rates which had just been authorized by the California Commission as Pacific's Schedule R applicable to intrastate resale service to replace the rates specified in said Schedule P-31 upon which the 1948 contract was based.

7. Sierra requested that Pacific's filing for an increase in rates be rejected. It contended that the rate specified in the 1948 contract was fixed for the term of the contract, and could not be changed under the provisions of Section 205 of the Federal Power Act except upon mutual agreement of the parties. Sierra further contended that any other change in the rates would have to be initiated under Section 206 of the Federal Power Act and that the F.P.C. would have to find that the rate specified in the contract was adverse to the public interest before it could grant an increase. These contentions were denied by Pacific. The F.P.C. denied Sierra's request.

8. Pursuant to Section 205(d) of the Federal Power Act the F.P.C. then suspended Pacific's proposed increase until September 6, 1953, and ordered a hearing thereon, reserving to Sierra the right to contest the validity of the filing.

9. Extensive hearings were held by the F.P.C. on Pacific's proposed rate increase. Sierra did not contest the fact that the rate specified in the March, 1948, contract was unreasonably low or that the proposed new rate would not

produce in excess of a reasonable rate of return but contended that the rate specified in the contract was meant to be firm for the term of the contract and that, in the absence of mutual agreement, it could be changed only in a proceeding under Section 206 of the Federal Power Act upon a finding that it was against the public interest.

10. In answer to this argument, Pacific contended that the contract rate was not meant to be fixed for the term of the contract, but was intended and understood by the parties to be subject to change if Pacific's costs of service changed, subject, of course to regulatory approval.

11. The F.P.C. determined that it was unnecessary to decide whether the contract was for a fixed or changeable rate and made no finding on that issue. It ruled that any contract rate could be changed by the procedure set forth in said Section 205. The F.P.C. then proceeded to determine on the merits, in its Opinion No. 270 issued June 17, 1954, that Pacific's proposed new rate was not unjust, unreasonable, or unlawful, concluding that if a finding on the lawfulness of the rate specified in the 1948 contract were necessary (as Sierra had been contending) that finding would have to be that the 1948 rate was unreasonably low and therefore unreasonable and unlawful. It therefore terminated the proceedings, and Schedule F.P.C. No. 3, Supplement No. 1 became the authorized rate for the service covered by the 1948 contract.

12. As a party "aggrieved" by the said order of the F.P.C., Sierra sought judicial review before the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals set aside the order of the F.P.C., but "without prejudice to the initiation of a new proceeding [by Pacific] under § 206(a)." The case was then taken over by the Supreme Court on certiorari. In the Supreme Court

the question was whether, as the F.P.C. had held, any and all contract specified rates could be changed under the procedure provided by Section 205. The Supreme Court held that all contract rates could not be so changed. It held that the F.P.C. did have power to change any contract rate upon finding that such rate was unlawful but that if the contracting utility had agreed to accept less than a fair return the sole concern of the F.P.C. would seem to be whether the rate is so low as to adversely affect the public interest "as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden or be unduly discriminatory." The Court stated that "Whether under the facts of this case the contract rate is so low as to have an adverse effect upon the public interest is of course a question to be determined in the first instance by the Commission." It held that the inquiry should be made in a Section 206(a) proceeding, but stated that it would be immaterial here that the investigation was not begun under that section, if the findings were made by the F.P.C. which satisfied the substantive requirements of that section. It held that the findings which had been made by the Commission did not satisfy such requirements. The order of the F.P.C. in Opinion No. 270 was therefore set aside and the case was remanded to the F.P.C. "for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable."

13. Pursuant to the Supreme Court's mandate, the United States Court of Appeals for the District of Columbia, by order, dated June 12, 1956, duly remanded the case to the F.P.C.

14. In light of the new aspect put upon the proceeding by the Supreme Court opinion, Pacific, on the remand, moved the F.P.C. to reopen Docket No. E-6482 in order (a) to make findings as to whether the rate specified in the 1948

contract was on and prior to June 17, 1954, and thereafter, "so low as to have an adverse effect upon the public interest" and whether the rate of Supplement No. 1 to Schedule F.P.C. No. 3 was not in excess of a just and reasonable rate for the service rendered on and after June 17, 1954; and (b) to allow Pacific to present further evidence on those points, in addition to that already in the record, to show that the rate of Schedule F.P.C. No. 3 was, prior to June 17, 1954, and ever since has been (1) so low as to impair the financial ability of Pacific to continue its service to Sierra, (2) so low as to cast upon other consumers an excessive burden, and (3) so low as to be unduly discriminatory.

15. By order issued September 7, 1956, the F.P.C. permitted Pacific to file, in accordance with Sections 1.15-1.17 of F.P.C. Rules of Practice and Procedure, a showing of any facts and a statement in writing of any further argument it might wish to adduce in support of its motions in Docket No. E-6482 and its answer in Docket No. E-6697 in which Sierra had requested that Pacific be ordered to cease billing Sierra at the rates contained in Schedule F.P.C. No. 3, Supplement No. 1.

16. By verified Supplemental Motion, dated October 10, 1956, Pacific requested that the Commission also make findings on the issue left undecided by the F.P.C. in the original proceeding, namely, whether the 1948 contract was in fact one for a fixed rate as contended by Sierra or a changeable rate as contended by Pacific. Pacific also requested that the F.P.C. take further evidence on this issue, including the testimony of N. R. Sutherland, President of Pacific, who personally conducted the concluding negotiations for the 1948 contract. Pacific stated that the additional evidence would show that as a consideration for the execution of the contract in the form in which it was executed Sierra expressly represented that it fully understood that the rate

specified in the contract was subject to change upward or downward in accordance with changes in Pacific's standard resale tariff (P-31), the tariff which was adopted as the contract rate.

17. In accordance with the order of September 7, 1956, Pacific, on October 15, 1956, filed with the F.P.C. a verified submission to amplify and support its motions for reopening and further hearing in Docket E-6482 and to support its answer in Docket No. E-6697.

18. By its order issued July 10, 1957, a copy of which is attached hereto, marked Exhibit "A", and by reference made a part hereof, the F.P.C. denied Pacific's said motions in Docket No. E-6482 and granted Sierra's motion in Docket No. E-6697.

19. Within thirty days after issuance of said order of the F.P.C., Pacific, pursuant to Section 313(a) of the Federal Power Act, filed with the F.P.C. an application for rehearing. A copy of said application is attached hereto, marked Exhibit "B", and by reference made a part hereof.

20. On September 5, 1957, the F.P.C. issued its order denying Pacific's application for rehearing. A copy of said order is attached hereto, marked Exhibit "C", and by reference made a part hereof.

Grounds Upon Which Relief Is Sought

Pacific seeks review of the F.P.C.'s said order, issued July 10, 1957, upon the following grounds:

A. The F.P.C. erred in granting Sierra's motion in Docket No. E-6697 and in not granting Pacific's motions to reopen Docket E-6482 for further hearing therein to determine and make findings, and in failing to find, that the 1948 contract rate was adverse to the public interest in that:

1. The Supreme Court held that the F.P.C. could have changed the rate specified in the 1948 contract in the original proceedings if the F.P.C. had found that that rate was against the public interest in accordance with the standards set down by the Court for a Section 206(a) proceeding. The Court held that the issue of the effect on the public interest "* * * is, of course, a question to be determined in the first instance by the Commission." Now that the ruling of the Supreme Court has completely changed the background in which the original hearings were conducted, the F.P.C., which was in error as to the standards to be met before it could change a contract rate (assuming it were a fixed rate) in the original proceedings, refuses, in summary fashion, to give Pacific an opportunity in a reopened hearing to prove its contentions that the rate is against the public interest within the standards now established by the Supreme Court. Such action by the F.P.C. is arbitrary and capricious and an abuse of its administrative discretion.

2. The remand did not terminate or dismiss the administrative proceedings. The Supreme Court merely set aside the F.P.C.'s Opinion No. 270. There are now, therefore, no findings by the F.P.C. in these proceedings on any issue declared by the Supreme Court to be determinative in dealing with the Pacific-Sierra rates, assuming a fixed rate contract.

The Supreme Court has stated that the prior proceedings as conducted would be sufficient to satisfy Section 206(a) if the findings required by that Section were made. Section 206(a) provides that "Whenever the Commission, after a *hearing* had upon its own motion or upon complaint shall *find* that any rate * * *" (Emphasis added) is unjust, unreasonable, unduly discriminatory or preferential it shall determine the rate to be thereafter observed. The F.P.C. has, however, refused to grant a hearing on the very issues which have, since Opinion No. 270 was issued, become fundamental to the whole proceeding, and has failed to make any findings thereon whatsoever. The action of the F.P.C. is arbitrary and capricious and an abuse of administrative discretion.

3. The F.P.C. in its order issued July 10, 1957, states as follows at page 5 thereof:

> "As we interpret that decision [of the Supreme Court], the relevance of revenue deficiency studies of the type proffered by PG&E in support of its current allegations would seem to be only with regard to establishing the subsidiary fact that the cost of rendering the Sierra service exceeds revenues therefrom *which may or may not* impair PG&E's financial ability to continue service as a public utility, cast an excessive burden upon other of PG&E's electric utility customers, be unduly discriminatory, or otherwise adversely affect interests of public concern; the *ultimate fact* to be ascertained." (First emphasis added.)

The F.P.C. has thus recognized that Pacific has shown circumstances which *may* adversely affect the public interest within the standards set down by the Supreme Court yet it has denied Pacific the right to a hearing to establish its contentions as fact and has made no findings with respect thereto.

The F.P.C. claims, in short, that it has discretion to refuse a hearing, even though the facts presented to it show that the public interest "may" be adversely affected. In refusing a hearing under such circumstances, the F.P.C.'s action is capricious and arbitrary and an abuse of administrative discretion.

4. The record in these proceedings, the motions of Pacific and its submission in support thereof show conclusively that the 1948 contract rates are against the public interest within the standards established by the Supreme Court.

B. The F.P.C. erred in not reopening the hearing so that it could make a finding on the specific meaning of the 1948 contract and in refusing to take further evidence on that issue in that:

1. The order of the F.P.C. issued July 10, 1957, and the order issued September 5, 1957, show conclusively that the only reason the F.P.C. refused to consider the contract issue was that it believed it was foreclosed by the opinion of the Supreme Court. The Supreme Court did not, however, purport to decide the nature of the 1948 contract. It merely reviewed the issues on which findings were made by the F.P.C. The F.P.C. had refused and failed to make findings on the contract issue, erroneously determining instead that the issue was immaterial. In the absence of findings and a ruling on the contract issue, the issue was not presented to the Supreme Court for its determination. The F.P.C. has thus refused to hear evidence and make findings on an issue which, since Opinion No. 270, has become of fundamental importance and on which it erroneously failed to rule in the first instance. Such action by the F.P.C. is against the law and is arbitrary and capacious and an abuse of administrative discretion.

2. The interpretation of the contract by both parties as evidenced by the record of the proceedings already before the Commission was that the contract rate was not fixed but subject to change, the only difference between the parties being that under Pacific's view it was entitled to change the rate in accordance with changes in the rate of its intrastate resale Schedule P-31 whereas under Sierra's view Pacific was entitled to a rate change only if it did not earn more under the contract than it would save if Sierra's business were lost or abandoned or if it did not return incremental or out-of-pocket costs. Under either view Pacific

would be entitled to an increase in its rate as a matter of contractual right upon the showing made by Pacific to the F.P.C., and the failure of the F.P.C. to find on this issue and its failure to hold further hearings with respect thereto is against the law and is arbitrary and capricious and an abuse of administrative discretion.

3. Custom in the utility business and the law under which the contract was entered into show that the 1948 contract rate was not a fixed rate and that upon the record already made in Docket E-6482 and the showing made by Pacific in its motions and submissions Pacific is entitled to an increase in the 1948 contract rate. The failure of the F.P.C. to find or hold further hearing on this point is against the law and is arbitrary and capricious and an abuse of administrative discretion.

C. The foregoing objections to said Order of said Commission, the review of which is sought herein, were set forth and urged by the Petitioner in its application for rehearing before the F.P.C.

D. Said Order of the F.P.C. operates to deprive Petitioner of its property and rights without due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

E. This Petition is filed within sixty days after the Order of the F.P.C. denying Petitioner's application for rehearing.

F. A copy of this petition will forthwith be served upon a member of said Federal Power Commission.

Relief Prayed

Wherefore, Petitioner prays that said order of the Federal Power Commission, issued on July 10, 1957, be reviewed by this Honorable Court, and for the entry of a judgment or decree wholly setting aside and annulling said order and directing the Federal Power Commission to reopen Docket No. E-6482 and to take further evidence and hold further hearing therein, and for such other relief to the Petitioner as may be just and lawful in the premises.

Respectfully submitted,

F. T. Searls
F. W. Mielke, Jr.
Malcolm A. MacKillop

Attorney for Petitioner
Pacific Gas and
Electric Company

State of California
City & County of San Francisco—ss.

E. E. MANHARD, being duly sworn, deposes and says:

That he is an officer, to wit, Secretary of PACIFIC GAS AND ELECTRIC COMPANY; that he has read the foregoing Petition To Review and Set Aside Order Of the Federal Power Commission And To Take Further Evidence and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

E. E. MANHARD

Subscribed and sworn to before me on November 1, 1957.

MARIE H. STANLEY

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires: November 22, 1959.

Relevant Provisions of the Federal Power Act

Sec. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 851; 16 U.S.C. 824d]

Sec. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852; 16 U.S.C. 824e]

Sec. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the license or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [49 Stat. 860; 16 U.S.C. 825*l*]

16K [illegible]

REPLY BRIEF AND APPENDIX FOR PETITIONER

In the

United States Court of Appeals

for the

District of Columbia Circuit

No. 14,422

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner,*

vs.

FEDERAL POWER COMMISSION, *Respondent.*

SIERRA PACIFIC POWER COMPANY, *Intervener.*

ON PETITION TO REVIEW ORDER OF FEDERAL POWER COMMISSION

F. T. SEARLS
245 Market Street
San Francisco 6, California

ROBERT E. MAY
1700 K Street, N.W.
Washington 6, D.C.
Attorneys for Petitioner

Of Counsel:
FREDERICK W. MIELKE, JR.
MALCOLM A. MACKILLOP
ROGER J. NICHOLS
245 Market Street
San Francisco 6, California

MAY, SHANNON AND MORLEY
1700 K Street, N.W.
Washington 6, D.C.

United States Court of Appeals
For the
District of Columbia Circuit

FILED FEB 5 1959

Joseph W. Stewart
CLERK

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

In the

United States Court of Appeals

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No. 14,422

Pacific Gas and Electric Company, *Petitioner,*

vs.

Federal Power Commission, *Respondent.*

Sierra Pacific Power Company, *Intervener.*

REPLY BRIEF FOR PETITIONER

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INTRODUCTORY STATEMENT

The briefs of the Commission and Sierra seem bent on confusion rather than clarification of the issues. Some of the confusion in the Commission's brief may come from its own confusion as to the rules governing appellate process and as to the scope of its discretion. Sierra, on the other hand, seems so busy shouting epithets, hurling insults, and feigning wrath and indignation that it never concerns itself with getting down to the real issues in the case.[1]

We shall try (as dispassionately as we can in the face of Sierra's wholly unfounded and provocative insults) to adhere to the simple issues in this case and to assist the Court in deciding them. Sierra's abusive language will not be responded to in kind.

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[1] For example, aside from referring to the earlier proceedings, Sierra cites only one case authority in its entire 41-page brief. It distinguishes none cited by Pacific.

ARGUMENT

I.

THE CONTRACT ISSUE

In its counterstatement of the issues, the Commission states that the question here is whether Pacific "can * * * attack collaterally in this proceeding *holdings* by this Court and the Supreme Court in earlier proceedings." (Emphasis added.)

This of course is not the issue at all, but begs one of the very issues to be decided. Of course a litigant cannot attack collaterally a holding of a court—and we are not attempting to do so. The question is whether there *was* a holding on the contract issue. Pacific's position is that there was not. Its position is clearly stated in its brief: The issue was not decided by the Commission (Pet. Br. p. 17). It was not decided by this Court (Pet. Br. pp. 17, 25-34). And it was not decided by the Supreme Court (Pet. Br. pp. 18, 25-34). The proper tribunal to decide the question is the Commission (Pet. Br. pp. 25, 36-37) and it should now decide it (Pet. Br. pp. 38-40).

Pacific's position is simple. There is no warrant for the Commission's misstatement of it.

Since neither the Commission nor Sierra really answer Pacific's position on the contract issue, we need comment but briefly on their contentions:

First, neither the Commission nor Sierra contend that the Commission made a finding as to whether the parties contracted for a "fixed" or "changeable" rate. They contend, however, that in spite of the lack of such a finding, this Court and the Supreme Court made the finding on appeal. In so contending they completely ignore the most recent decision by the Supreme Court in *United Gas Pipe*

Line Co. v. Memphis L., G., & W. Div., ... U.S. ...., 3 L. Ed. (Adv.) 1953 (1958), in which that court clearly held that the interpretation of a service contract is a question of fact to be decided in the first instance by the Commission. The *Memphis* case merely reaffirms the decisions by this Court to the same effect cited at page 25 of our opening brief, which the Commission and Sierra do not distinguish. Obviously the Supreme Court did not undertake to decide as a matter of law a question it did not state it was deciding and which it looks upon as a question of fact for the Commission. For the Court's convenience we have attached as Appendix I the petitions and briefs[2] before the Supreme Court from which it can be seen that the contract issue was not a question presented to the Court for decision. See also the Supreme Court's own statement of the question before it (Pet. Br. pp. 18, 27).

Second, the Commission in its argument assumes the very facts in issue. It says that the contract is "unambiguous" (Resp. Br. p. 15) and "on its face provides for a fixed rate" (Resp. Br. p. 24). This is, of course, the first time the Commission has made this contention anywhere, having contended in its order that it was not free to consider the issue. Aside from that, however, is the contract "on its face" one for a "fixed" rate? In paragraph 12 it provides:

> "12. This agreement shall become effective as of January 1, 1948, upon the procurement of an order

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[2] Examination of Pacific's reply brief will readily show that it did not "raise" the contract issue or "invite" a decision on it as the Commission and Sierra claim (Resp. Br. 16, 18; Int. Br. 32-33), but merely made clear that on the issue as to the *true* meaning of the contract—on which the Commission's decision did not turn, on which it made no findings, and which was not before the court as a question to be decided—Pacific was not acquiescing in Sierra's erroneous statements of the disputed factual circumstances of the case. (See Appendix I hereto pp. 223, 240-248; and see also Pet. Br., pp. 36-37.)

> of the Public Utilities Commission of the State of California authorizing the parties hereto to carry out the terms and conditions hereof. This agreement shall at all times be *subject to such changes and/or modifications* as said Commission may from time to time direct in the exercise of its jurisdiction." (Emphasis added; R. 1558.)

Pacific has always contended that this paragraph, plus the fact that the rate in the contract was the P-31 rate, shows plainly that the contract contemplated a changeable rate. Pacific believes that the contract is clearly one for Pacific's "going" P-31 rate (see Pet. Br. p. 10 and p. 6 note 3).[3]

Pursuant to the contract, the parties obtained the authorization of the California Commission to carry out the contract. They obviously contracted for California Commission jurisdiction and with California law in mind (Supp. App. R. 901-904). What is that law?[4] The Commission ignores it. What was the significance of incorporating the P-31 rate in the contract? The Commission makes no attempt to say. What was the custom in the industry in California which formed the background for this contract? Again, no mention of this.[5] Is not Mr. Sutherland's affidavit bearing on these and other matters of vital significance, especially since it is entirely consistent with the meaning of paragraph 12 of the contract? None of these matters are barred by the parole evidence rule. Parties have always been free to show the law and custom in the light of which technical contracts are made. Doing so can substantially aid in their interpretation, as this court and the Supreme Court have recognized in the cases previously referred to. (See also authorities cited to the Commission in Pacific's Application for Rehearing dated August 8, 1957, at Supp. App. R. 3118-3124). Sierra and the Commission cite no cases to the contrary.

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[3] The fact that paragraph 12 shows the changeability of the rate answers the Commission's attempt to rely upon *Montana-Dakota Util. Co. v. Northwestern Pacific Serv. Co.*, 341 U.S. 246 (1951). (See Resp. Br. pp. 13, 27.)

[4] Among other things, that law makes contract rates subject to change at any time. *Law v. Railroad Commission of California*, 184 Cal. 737, 195 Pac. 423 (1921); *Market St. Ry. Co. v. P.G.&E. Co.*, 6 F.2d 633 (N.D. Cal. 1925). Unlike the Federal Power Act it makes rates subject to increase if "insufficient." California Public Utilities Code § 728. See particularly the excerpt from *Re Southern California Edison Co.*, 21 P.U.R. 3d 15. 45-47 (1957) appended hereto as Appendix II in which the California Commission overruled almost every contention here made by Sierra as being inapplicable in a California rate case.

[5] *C.f.*, *United Gas Pipe Line Co. v. Memphis L., G. W., Div., supra.* .... U.S. .... 3 L.Ed. (Adv.) 153 (1958), where the court emphasized the importance of such evidence.

Third, neither the Commission nor Sierra attempt to answer or distinguish the rules and supporting authorities set forth at pages 25 to 40 of our opening brief to show that neither "law of the case" nor "res judicata" prevent the Commission from now deciding the contract issue. Strangely, the Commission attempts to rely on *City of Tacoma v. Taxpayers of Tacoma*, ... U.S. ...., 2 L.Ed. (Adv.) 1345 (1958)—the *only* authority cited by it on this point—to establish that Pacific is trying to attack collaterally the Supreme Court's decision. That case, originally raised by Sierra, was completely answered by Pacific in its Answering Memorandum to Intervener's Supplemental Memorandum Regarding *Tacoma* Case, which is attached hereto as Appendix III for the Court convenience. Sierra has abandoned all reference to the case.

Fourth, the Commission and Sierra both try to argue that Pacific has not been consistent in its position on the contract issue. Sierra, in a bitter calumny, accuses us of having falsified when we say that Pacific urged upon the Commission, as a second alternative ground, that the contract between the parties was for a "changeable" rather than a "fixed" rate. This is almost the entire substance of Sierra's Point II—a section of 21 pages—which comprises more than half of Sierra's brief.

When the smoke and confusion engendered by Sierra's inflammatory words have finally blown away, what do we find to be the basis of Sierra's furious contention that Pacific did not urge the contract issue upon the Commission for its decision? All Sierra says is that it was *Sierra* who raised the issue and not *Pacific*.

The important facts are simply these: (1) Pacific urged upon the Commission that the parties agreed upon a "changeable" rate; (2) Sierra urged that it was a "fixed" rate; and (3) the Commission—instead of resolving this dispute—*declined to find* whether the contract was or was not for a fixed rate and ruled instead that *any* contract rate, even a "fixed" one such as Sierra claimed it had, could be changed in a § 205 proceeding.

Fifth, the Commission's strange contention that Pacific should have petitioned the Supreme Court to change the form of its remand to *expressly* order the Commission to decide the contract issue is fully answered by the argument and the authorities, which are not disputed, contained in our opening brief. As we there pointed out, an appellate court reviewing a decision of an administrative body reviews only the particular ground on which the agency rests its decision (Pet. Br. pp. 28-29, 37). If error is found in that ground, the review is at an end and the case is then remanded to the agency so that the error in that ground might be corrected by the agency (Pet. Br. pp. 38-40). This does not, however, foreclose the agency from deciding the case on an alternate ground not used in its original decision because it erroneously thought that the ground selected for its original decision was entirely correct.

As Professor Davis so well put it in his definitive work on administrative law: Where a case before an agency can be decided on any one of several grounds and the agency "decides the case on one ground" but is met with "judicial rebuff" on that ground, the agency is not thereafter "barred from reconsidering the whole case on a new record ~~in~~ and deciding on other grounds." (Davis, Administrative Law, p. 611; see also Pet Br. pp. 32-34).

Thus, since the remand of the Court in no sense precluded the Commission from deciding the contract issue, Pacific in no sense can be said to have acquiesced in any "holding" by the Supreme Court that the contract issue was foreclosed. On remand the Federal Power Commission clearly had the right and duty to consider the contract issue now made so important.

Finally, we come to Sierra's accusations, repeated throughout its brief, that Pacific has misstated the facts. In at least 26 places Pacific is accused of falsehoods. On at least eight occasions other serious misconduct is imputed, and finally Pacific is accused twice of "meretricious" conduct.

Neither time nor space is allowed in a reply brief to respond to such charges in detail. Reply to this sort of thing, however, is quite unnecessary. Our opening brief is fully documented with supporting references to the record and we stand upon them. Had any errors been found, we would of course quickly have corrected them. But we refuse to be drawn away from the main course of our argument by diversionary tactics, no matter how provocative.[6] All we need say about Sierra's so-called "catalogue" of misstatements is that it serves as a highly convenient digest of our contentions—each one, we submit, fully supported by the record.

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[6] About the only point worth commenting on is Sierra's *interpretation* of what certain language in Mr. Sutherland's affidavit (Supp. App. R. 3140-3141) means. Mr. Sutherland avers that Mr. Tracy acknowledged that the rate in the contract would "move up

Upon examining our contentions, and the record references on which they are based, we believe the Court will agree with us that Sierra's vituperative brief is best explained by the old lawyer's advice that "when the law is in your favor, you argue the law; when the facts are in your favor, you argue the facts; but when neither is in your favor, you just shout!" Sierra's counsel quite obviously feel that their case calls for the third category of treatment.

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or down with changes in the P-31 rate" and that "He [Mr. Tracy] said * * * that it could not be any other way because *the rate* was subject to change by the California Public Utilities Commission." (Italics added.) Sierra in its brief (p. 36) construes this as meaning only that the parties believed the California Commission had jurisdiction to change the rate in the contract. Even if this *is* what it means, it proves the parties agreed to a changeable rate. (See above, page 4, note 4.) In context, however, we think the italicized words, "the rate," mean the P-31 rate on file with the California Commission. Any question, however, can be resolved by examining Mr. Sutherland on the witness stand in reopened proceedings.

II.

ABUSE OF DISCRETION UNDER § 206

In answer to our showing of facts as to why it was an abuse of discretion for the Commission to refuse to find whether the existing rate is "so low as to adversely affect the public interest" under § 206, the Commission spends some five pages (pp. 28-33) arguing that the Commission has discretion under § 206. This, of course, does not meet the issue at all. The issue is whether the Commission *abused* its discretion. We submit that under the facts shown (Pet. Br. pp. 41-47), it is clear beyond question that the Commission flagrantly abused its discretion. Indeed, the abuse of discretion, based as it clearly was on pure arbitrariness and capriciousness, was so severe as to amount to an out-and-out denial of due process of law. (See Pet. Br. pp. 43-47.)

Apparently the Commission now inwardly realizes this, for it now suggests that Pacific might be deemed to have consented to the absence of a hearing when it asked to file a reply "in writing" to Sierra's answer to Pacific's motion to reopen (Resp. Br. p. 9). This inverted logic, we submit, merely reveals how desperately the Commission is looking for excuses. Obviously a filing *in support* of a motion is not a consent to a *denial* of it![7]

In attempting to deal with the facts in Pacific's submission, both the Commission and Sierra argue that Pacific tried, and failed, to show that its "financial ability" to continue the Sierra service was impaired. This, they say, shows that Pacific's "private" interest but not the "public" interest has been adversely affected by the low rate to Sierra. (See Resp. Br. pp. 29, 33-37; Int. Br. pp. 7-9.)

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[7] The submission itself requested a hearing (Supp. App. R. 2895).

Again, the argument misses the issues entirely. Pacific's submission sought to show that the abnormally low rate to Sierra was against the public interest because (1) it was "unduly discriminatory" and (2) it cast an "undue burden" on other customers. Let us examine the answering briefs on each of these points.

(a) Discrimination Against Other Customers.

With reference to discrimination, Pacific's submission pointed out two plain facts: (1) The rate approved by the Commission for Copco (California Oregon Power Company), which is Pacific's only other interstate customer,[8] is 22% higher than Sierra's rate. (2) Yet the cost of serving Copco is nearly 15% less than the cost of serving Sierra. (See discussion, Pet. Br. pp. 20, 44.) In the face of these facts, the Commission states that Pacific did not make out a "prima facie" case of discrimination (Resp. Br. pp. 36, 33). We submit, however, that these facts plainly make out a "prima facie" case[9] and that the Commission's bald statement to the contrary—without even referring to the percentage differences involved—is but added proof of the arbitrariness with which the Commission has acted throughout.

Sierra seeks to justify this obvious discrimination by saying that Copco has not complained about it (Int. Br. p. 9). The test, however, is not whether Copco feels *its* interests are being adversely affected by the 22% higher rate, but whether Copco's *customers,* the public, are being adversely affected. The Commission cannot substitute Copco's judgment for its own. Presumably Copco is making a 6% or other reasonable return on its investment and is having no difficulty passing along to its customers the 22% higher rate. But while Copco may have no motive to speak out against the discrimination,[10] it is the Commission's duty to do so. That Copco itself is not moved to examine into the matter[11] is of no moment whatever.

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[8] Pacific singled out Copco for comparison because Pacific's resale service to Copco is the only other service falling within the Commission's jurisdiction. The same discrimination also exists, however, as to all Pacific's intrastate resale customers who formerly were on the P-31 rate, since all of them, like Copco, are now on Schedule R or equivalent. (See Pet. Br. p. 44, note 22.)

[9] The Federal Power Act prohibits unreasonable differences between "classes of service" or "localities." (Federal Power Act, § 205; 49 Stat. 851; 16 U.S.C. § 824d.)

(b) Burden upon Other Customers.

As to the "undue burden" on Pacific's other customers, Pacific's submission showed that it was actually incurring an out-of-pocket loss of over $500,000 per year on less than $2,000,000 annual gross sales to Sierra—a loss which can be supported only out of earnings from other customers (Supp. App. R. 2899-2909). ~~2919~~). The Commission's answer to this is that the matter simply should be ignored because the Sierra business amounts to less than one percent of Pacific's total electric business (Resp. Br. p. 36).

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[10] It is to be noted that Copco's regular legal counsel, one of whom, Gregory A. Harrison, Esq., is a director of Copco and has been for several years, are also legal counsel of record for Sierra in its restitution action before the United States District Court (see Supp. App. R. 2690). They also were counsel of record for Sierra in the instant petition to review when it was before the U.S. Court of Appeals for the Ninth Circuit (see copies of motions and briefs filed before the Ninth Circuit in this matter and now forwarded to this Court). In fact, they may still be connected with the instant case (see, for example, the Commission's Certificate of Service of January 20, 1959, showing the attorneys served with a copy of the Commission's brief in this matter.) Pacific is informed that Copco sought and received advice from Mr. Harrison's firm before giving its noncommittal answer to the Commission's letter.

[11] Copco's noncommittal and carefully worded letter does not deny that its customers are adversely affected, but states only that it is "not aware of any effect" upon its customers and that it "does not feel sufficiently informed at the present time to express an opinion" as to whether there is undue discrimination (Supp. App. R. 7802).

This answer seems incredible but it now appears that it is in actuality the exact reason for the Commission's refusal to act. At page 36 of the Commission's brief, the Commission plainly says: "[It] should be borne in mind that the Sierra contract represents less than one percent of Pacific's gross electric business." Apparently, although it did not so hold in its order denying Pacific a hearing, the Commission has decided that in view of Pacific's size a loss of over $500,000 a year should be ignored as *de minimis.*[12]

This tardy announcement by the Commission of the real basis for its decision shows ever more plainly that the Commission has acted against the law.

(c) Losses from Interstate Business Cannot Be Subsidized by Earnings on Intrastate Business.

The law is clear that the Commission may not allow losses on interstate sales to be subsidized by earnings on intrastate sales. In fixing rates for interstate sales, the Commission must apply only interstate revenues against interstate costs. The reason is obvious, as this Court has very clearly stated:

> "The federal statute * * * forbids federal regulation of local intrastate rates. * * * If the uncompensated interstate costs be imposed upon the local intrastate business, the federal authority has, by indirection, control of those rates * * *."

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[12] That this was the real basis for the Commission's refusal to grant a hearing is also apparent from what we have discovered in footnote 37, page 6, of the Commission's brief before the Supreme Court in *United Gas Pipe Line Company v. Memphis Light, Gas and Water Division, supra,* .... U.S. ...., 3 L.Ed. 2d (Adv.) 153 (1958). There the Commission says:

> "Where, as in the Sierra case on remand to the Commission * * * , the Commission finds that a pre-existing contract rate is not so low as to be contrary to the public interest, or governs only a de minimis part of the seller's business, the original contract price will stand."

In fact, of course, the Commission made no such findings.

Mississippi River Fuel Corp. v. F.P.C., 82 App. D.C. 208, 226; 163 F.2d 433, 451 (D.C. Cir. 1947).

Thus it is settled that intrastate earnings cannot be used to offset interstate losses.

See, *e.g.:*

Panhandle Eastern Pipe Line Co. v. F.P.C. 324 U.S. 635, 641 (1945). ("[T]he Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both. Otherwise, the profits or losses, as the case may be, of the unregulated business would be assigned to the regulated business. * * *")

Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 148 (1930). ("The separation of the intrastate and interstate property, revenues and expenses of the company is important. * * * It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.")

The Minnesota Rate Cases, 230 U.S. 352, 435 (1913). ("[T]he carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business.")

Smyth v. Ames, 169 U.S. 466, 541 (1898). ("[D]omestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business.")

See also:

Dayton-Goose Creek Ry. v. U.S., 263 U.S. 456, 483 (1924).

Illinois v. U. S., 146 F. Supp. 195, 201 (N.D. Ill. E.D. 1956).

In fact, the Commission itself regularly recognizes that it must separate interstate from intrastate revenues and costs when it examines rates because otherwise it would be encroaching upon state regulation.

See *e.g.*;

> *Re Cities Service Gas Co.*, ... F.P.C. ...., 50 P.U.R. (n.s.) 65, 89 (1943). ("The Company's facilities and operations are devoted in part to * * * service which is not subject to our jurisdiction. * * * The necessity arises, therefore, for making an allocation of costs as between the jurisdictional and non-jurisdictional sales.")
>
> *Re Allegany Gas Co.*, ... F.P.C. ......, 63 P.U.R. (n.s.) 231, 234 (1946). ("[I]t is necessary to make an allocation to segregate the cost of serving the jurisdictional business from the non-jurisdictional.")
>
> *Re Otter Tail Power Co.*, 8 F.P.C. 393, 405 (1949). ("Neither can we accept the argument that it would be proper for us to deny an increase in noncompensated wholesale rates so long as the Company is earning a fair share on its total electric utility business jurisdictional and non-jurisdictional.")

Looking then at only the *jurisdictional* business, we find that the Sierra contract does not represent merely a bit less than 1% of Pacific's gross electric business. Turning to the figures set forth on Schedule 4, Sheet 1, of Pacific's Submission (Supp. App. R. 2919) and doing a little calculating, it is seen that for 1955 the cost of the Sierra service was almost three-fourths (72%) of the cost of all jurisdictional service, yet the gross revenue from it was not much over one-half (52%) of the gross revenue from all jurisdictional business. Hardly a *de minimis* deficiency!

In treating the loss on the Sierra service as *de minimis* on the theory that Pacific's overall intrastate earnings can support it, the Commission has plainly acted against the law and has shown by its own argument that the Sierra service is being carried by Pacific's other customers.

(d) An Out-of-Pocket Loss on Any Utility Service Is Against the Public Interest; There Is No "De Minimis."

In attempting to dismiss the Sierra loss as *de minimis,* the Commission also violated a second fundamental precept of rate regulation, namely, that each utility service must pay for its own costs. On this requirement, there is no principle of *de minimis.* The governing principle is just the opposite and can be found well stated in a recent decision on the very point by the Maine Supreme Court:

> "The amount involved, $18,000, is unquestionably small in comparison with petitioner's total gross revenue of $29,500,000 reported in October 1954. It is less than 1% of the total increase of $2,520,000 authorized in the general rate case. We may well agree that the petitioner's ability to perform its obligations to the public will not be hampered materially if the contract rate is maintained without increase. The respondent's argument, unsound in our view, leads to the conclusion that a given rate within a utility system should not be increased provided sufficient income is obtainable elsewhere.
>
> "The governing principle in adjustment of rates is more equitable. If rates must increase, all should bear the burden. Surely the customer whose rate is last to be considered should not escape a general increase for the reason that he is last in line or that sufficient income has been raised elsewhere."
>
> *Central Maine Power Co. v. P.U.C.,* 152 Me. 32, 36-37; 122 A.2d 541, 543-544 (1956).

See also:

Re Consolidated Edison Co. of N. Y., 78 P.U.R. (N.S.) 221, 227 (1949). ("[A] rate for a class of service

> must be reasonable per se and not justified merely because the Company's earnings as a whole are satisfactory.")

As Sierra itself forthrightly recognized in its original brief before the Commission, the Sierra rate is against the public interest as a matter of law if it does not cover Pacific's out-of-pocket costs (Supp. App. R. 2351-2352).

(e) The Burden of the Sierra Loss Is Inescapably Borne by Other Customers.

It is idle to suggest, as Sierra does at page 9 of its brief, that Pacific's stockholders are bearing the burden of the Sierra loss.[13] Pacific's only sources of money are revenue from its customers and proceeds from the issue of equity and debt obligations. Pacific could neither sell its securities nor borrow money unless it could assure an adequate return. The money to pay that return and also carry on its business must come to Pacific from its customers. There is only one "pot" of money. If some of the customers do not contribute to that pot the others must contribute enough to attract investors and carry on the service including the service to those who do not pay their way. That this is highly discriminatory and a totally unwarranted burden to the paying customers is beyond question.

The language of the California Commission quoted by Sierra at page 8 of its brief to the effect that "stockholders must bear any burden" did not have and never has had the far-reaching meaning claimed for it by Sierra. It means no more than that in the rate case then before the Commission a particular rate will be considered as providing a full rate of return for the purpose of determining necessary revenue *in that proceeding.* That it does not bind the Commission and the utilities for all time is clear from such opinions as that in *Re Southern California Edison Co., supra,* 21 P.U.R. 3d 15, 45-47 (1957), an excerpt from which is attached hereto, in which the City of Vernon made the same erroneous argument as Sierra makes here. (See Appendix II, *infra.*)

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[13] Sierra constantly ignores the difference between a small reduction in *profit* and a *loss*. The Alameda rate referred to by Sierra (Int. Br. p. 9) merely provides for a slightly reduced margin of *profit,* which in a proper case may be borne by stockholders. However, where the earnings under the rate go below the originally authorized reduction in return, and especially where an out-of-pocket loss occurs as in the Sierra case, it is obvious that the money to make up the deficiency comes from earnings on service to other customers.

(f) Conclusion.

In essence, the answering briefs try to brush Pacific's submission lightly aside, as though it showed nothing. But it cannot be so handled. That the Sierra service is being operated at a loss subsidized by earnings from other public utility services is a fact which just will not lie down and be still. That it is against the public interest follows as the night the day. That it causes an unwarranted burden on other customers and is unduly discriminatory as to them is obvious.

The facts call for relief and they cannot be ignored. The Commission's plain disregard of them shows that the Commission acted against the law, arbitrarily and capriciously, and in denial of due process of law.

CONCLUSION

The relief prayed for in the Petition to Review should be granted.

Respectfully submitted,

F. T. Searls
Robert E. May
Attorneys for Petitioner

Of Counsel:

Frederick W. Mielke, Jr.
Malcolm A. MacKillop
Roger J. Nichols

May, Shannon and Morley

Dated: February 3, 1959

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petitioner's Brief upon all parties of record in this proceeding by mailing a copy thereof, properly addressed and postage prepaid, to each of such parties or its recorded counsel as follows:

Willard W. Gatchell, Esq.
Howard E. Wahrenbrock, Esq.
William W. Ross, Esq.
Federal Power Commission
441 G Street, N. W.
Washington 25, D. C.

William C. Chanler, Esq.
Lawrence A. Baker, Esq.
J. Philip Bahn, Esq.
Stephen A. Weiner, Esq.
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York 5, New York

....

Attorney for Petitioner
Pacific Gas and Electric Company

February ...., 1959.

(Appendices follow)

APPENDIX I

(Printed as Separate Volume)

APPENDIX II

Excerpt from
Re Southern California Edison Co.
21 P.U.R. 3d 15, 45-47 (1957)

Vernon Rates.

[22, 23] Applicant serves customers in the city of Vernon under a lease agreement, authorized by Decision No. 29749 on May 10, 1937 (40 CAL RC 486, 19 PUR NS 163) by this commission, at a level of rates about 25 per cent less than those charged to its other customers under general system rates. The rate level is that in effect in the city of Los Angeles on the system of the department of water and power. Since the time this lease agreement was approved competition between the city of Vernon's municipal electric system and the applicant's system in Vernon substantially has been eliminated.

The term of the agreement was for ten years commencing May 30, 1937. Vernon alleges that on October 1, 1946, it exercised its option to extend the term for an additional 10-year period ending May 29, 1957, and that again on July 3, 1956, exercised its option to extend the term for an additional 10-year period commencing May 30, 1957, and ending on May 29, 1967.

In the 1954 rate case, applicant requested authority to increase the Vernon rates when and to the extent that it found it feasible to do so.

As a result of Decision No. 50449 ([1954] 53 Cal PUC 385, 6 PUR3d 161), applicant was authorized to apply rates in Vernon not greater than those applicable in zone No. 1. Since the effective date of that decision, applicant states it has conferred and negotiated at length both with representatives of the city of Vernon and representatives of customers served in that city in an earnest endeavor to effect upward rate adjustments which, in the applicant's opinion, are fair and equitable under the conditions and circumstances involved. These negotiations were not successful up to the date of submission of this matter.

In the 1954 decision (*supra*), for rate-making purposes, we computed the revenue as though zone 1 rates were in effect. By that method no burden was placed on the other classes of customers, but such burden fell on the applicant's stockholders. Applicant now is of the opinion that a continuation of the Vernon differential, at the expense of either its other classes of customers or its stockholders, could not be considered just and reasonable.

Applicant takes the position, however, assuming as a matter of law that the term created by the lease is still in effect and will continue to be in effect for an additional period of ten years or longer (as to which applicant states there are serious legal questions) that: (1) there is nothing in the lease agreement which in any way limits the rate-making powers of the commission in so far as the customers in the city of Vernon are concerned; and (2) it will have no alternative but to bill such customers on the basis of any new and different rates ordered by this commission in this proceeding; and (3) its action in so doing should not result in any breach of any contractual obligation owing to the city of Vernon or the customers in the city nor in any forfeiture by it.

Vernon has filed an action in the superior court for declaratory relief. Applicant represents that such circumstances in no way affects or limits the right or jurisdiction of this commission to prescribe just and reasonable rates in Vernon. The city of Vernon takes the position that the commission should not order that system rates be applied in Vernon until such time as the Declaratory Relief Action has been determined by the courts.

The city of Vernon introduced Exhibit No. 49 and testimony for the purpose of showing that the rate of return was higher than the 1.2 per cent shown in the applicant's cost analysis and might be as high as 3.1 per cent if the department of water and power adopts higher rates as proposed for August 1, 1957. The city also takes the position that under all methods of computation the applicant is showing a positive rate of return from the Vernon system, that the applicant has not shown that the rates charged under the agreement are, or in the near future will be noncompensatory or will work to the detriment of the rate-bearing public, and that there has been no significant change in circumstances since the agreement was executed to justify an order that the applicant must apply general system rates in Vernon.

The commission has carefully considered the positions taken by the applicant and the city of Vernon. We find as a fact

(a) That the rates charged by applicant to its customers located in the city of Vernon are depressed far below a reasonable level.

(b) That said rates produce an unreasonable and inadequate return to applicant which results in either applicant or its other customers subsidizing the customers of applicant in Vernon.

(c) That there are industries served by applicant which are in competition with industries in Vernon, the former of which industries are required to pay substantially higher rates than similar industries in Vernon; thus creating unreasonable and unlawful prejudice to and discrimination against industries located outside of Vernon and unreasonable and unlawful preference to and discrimination in favor of industries located in Vernon. Furthermore, these depressed rates charged by applicant in the city of Vernon constitute prejudice to and discrimination against customers of applicant outside of but similarly situated and comparable to customers in Vernon, contrary to the public interest.

(d) That said rates charged by applicant to customers in Vernon constitute an unreasonable and unlawful burden upon the other customers of applicant and, also, upon applicant.

(e) That for applicant to continue to charge these depressed rates would have a direct tendency to disable applicant in the full performance of its public duty.

(f) That said rates and the unreasonable and unlawful burden which they create are contrary to the public interest and such burden should be removed in order that the public interest be protected.

Pursuant to the foregoing findings of fact we conclude that applicant should be ordered and directed to cease and desist from continuing to charge the rates to customers in Vernon provided by the contract between applicant and Vernon, and we shall order applicant to charge such customers the same rates as are or will hereafter be charged to other customers of applicant outside of Vernon.

We take this action with full awareness of the circumstances which originally persuaded applicant to accord special rate treatment to Vernon, and of the contractual obligation which applicant assumed in that respect. We do not presume to pass upon the validity of the Vernon contract or the rights and obligations of the respective parties arising therefrom. These are problems for judicial determination. But in the fixing of fair and reasonable utility rates the public interest is paramount, and private agreements, no matter how clear their justification from a private standpoint or how binding their terms as between the parties, cannot be permitted to prevail against the public interest.

It is elementary that this commission has authority to take action which will, in effect, abrogate a contract between a utility and its customer or customers where the public interest so requires. This is what we are here doing. In so doing we are remedying a situation of prejudice and discrimination, one of the principal evils at which regulation is directed and which regulation was instituted to redress. It is our clear duty to prevent applicant from complying with the terms of a contract in conflict with the public interest. It is not within our jurisdiction to determine what, if any, legal rights may accrue to Vernon as a result of applicant's compliance with this order.

APPENDIX III

In the United States Court of Appeals
for the District of Columbia Circuit

No. 14,422

Pacific Gas and Electric Company, Petitioner,

v.

Federal Power Commission, Respondent,
Sierra Pacific Power Company, Intervener.

PETITIONER'S ANSWERING MEMORANDUM TO INTERVENER'S SUPPLEMENTAL MEMORANDUM REGARDING TACOMA CASE

I

The Tacoma Case Is Not in Point.

The case of *City of Tacoma v. Taxpayers of Tacoma,* ...... U.S. ......, 78 S. Ct. 1209, 2 L. Ed. 2d (Adv.) 1345 (1958), cited by Sierra in its Supplemental Memorandum, is as inapplicable and irrelevant to the problem now before the Court as can be imagined. A brief comparison of the two proceedings plus reference to PG&E's memorandum now before this Court should suffice to dispose of Sierra's contentions:

1. In our case, although the issue as to the kind of rate agreed upon was presented and argued to the Commission in the original proceeding, the Commission made *no finding* on the issue because it deemed this issue immaterial under its view of the law that *any* contract, even one for a fixed rate, could be changed in a Section

205 proceeding. In the Tacoma case, the Commission *did find,* contrary to the contention of the State of Washington, that the City had met all requirements necessary to effect the purposes of its project.

2. In our case, although ignoring PG&E's argument that the contract was for a changeable rate, the Commission rendered its decision in PG&E's favor (on the theory above mentioned), and *granted* PG&E the rate relief it sought. In the Tacoma case, the Commission found against the State's contentions, *denied* the State's request, and granted the license to the City.
3. In our case, because PG&E was granted the relief it sought, *PG&E was not "aggrieved"* by the Commission's decision and had no standing to appeal from it and assign errors to the Commission's method of reaching its ultimate decision in PG&E's favor. In the Tacoma case, *the State was "aggrieved,"* had the right to and did appeal, assigning as error, among others, the Commission's finding that the City was able to effect the project.
4. In our case, on Sierra's appeal, PG&E could only correct any misstatements of fact made by Sierra in its briefs and strive to support, *not attack,* the Commission's decision to the extent possible within the findings made by the Commission. In the Tacoma case, on the State's appeal, it could and *did attack* the Commission's finding above mentioned.
5. In our case, on Sierra's appeal, the question posed and decided by this Court and the Supreme Court was whether the Commission had correctly ruled that a fixed-rate contract, such as Sierra claimed it had with PG&E, could be changed in a Section 205 proceeding. The courts *assumed* the contract to be for a fixed rate—they did not and could not undertake to make *findings* for the Commission on that issue. In the Tacoma case, the appellate

court ruled on a specific question presented to it *based on a Commission finding.*

6. In our case, the Commission's decision was *reversed.* In the Tacoma case, the Commission decision was *affirmed.*
7. In our case, the Commission proceedings were *not terminated.* The case was remanded to the Commission by the Supreme Court "for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable." The reversal setting aside the Commission order left *no final Commission order* in the case. In the Tacoma case, upon denial of certiorari by the Supreme Court *the Commission order became final* and the proceeding *terminated.*
8. In our case, the question as to the real nature of the contract arose, *not collaterally* in other litigation, but in the same direct proceedings which are not, pending this appeal, finally terminated. In the Tacoma case, the question of whether the City was able to effect the purposes of the project came into issue *in an entirely separate and collateral proceeding* instituted in the State court after the original proceedings were finally terminated.

In short, looking at the Tacoma case, we find no parallel whatsoever with our case. Thus, the Tacoma case is not in point with respect to *any* of the points relied upon by PG&E to support its prosition that the Commission must now determine whether the parties did in fact agree to a fixed-rate contract.

The legal points involved in the differences between the Tacoma case and our case are, we believe, made clear from the authorities discussed in our earlier memorandum, which indicated in rather summary fashion the issues involved in this case. We shall, however, briefly relate again what these legal points are and note where they are discussed in our earlier memorandum.

The difference between an affirmance by a reviewing court and a reversal by it is, of course, basic. On an affirmance of a lower tribunal's judgment, all issues presented by the judgment below—whether raised on the appeal or not—are deemed passed upon and therefore cannot be considered after the affirmance. In the case of a reversal and remand for further proceedings, however, only those matters actually "in terms discussed and decided" are ruled upon. (*E.g., Mutual Life Insurance Co. v. Hill,* 193 U.S. 551, 553-554 (1904); and see discussion at pp. 16-22, "Petitioner's Memorandum of Points and Authorities in Opposition to Intervener's Motion to Dismiss" filed herein May 5, 1958.)

The absence of findings is also of vital significance. In our case, unlike the Tacoma case, no findings have ever been made upon the issue in question. Thus, there was no finding dealing with the nature of the contract rate before the reviewing courts. All that the reviewing courts had before them was Sierra's contention that the contract was for a fixed rate and the Commission's decision that *any* contract, even one such as Sierra contended this one was, could be changed in a Section 205 proceeding. It is axiomatic, of course, that reviewing courts do not make findings for administrative agencies. They merely judge the propriety of their actions "on the grounds invoked" by these agencies. (*E.g., S.E.C. v. Chenery Corp.,* 332 U.S. 194, 196 (1947); and see pp. 21-22, memo. cited above.) Thus, the appeal did not determine whether the contract was in fact one for a fixed rate.

The fact that the issue as to the nature of the contract rate was presented to the Commission on a remand of the case for further consideration of the orginal proceeding is also of critical importance. After an original proceeding is carried to completion and the decision becomes final, the parties may not attack the correctness of that decision collaterally in another forum. In collateral proceedings the parties are bound to that decision by the principle of *res judicata*. The principle has no application, however, where the decision in the orginal proceeding is reversed and the matter remanded for further proceedings. In such event, the prior decision has been vacated and the issues have been set at large once again. The only matters concluded are those which were raised on the appeal and determined. These, and no others, form the "law of the case." (See pp. 16-17, 20, and 21-22, memo. cited above.) Thus, when an administrative agency decides a case "on one ground and is then met with judicial rebuff on that ground" (Davis, Administrative Law, pp. 611-612), it is incumbent upon the agency to "consider the problem afresh" (*S.E.C. v. Chenery Corp., supra*, 332 U.S. 194, 201 (1947). It cannot ignore the grounds erroneously overlooked before. (See discussion at pp. 8-15, memo. cited above.)

The fact that Sierra was the appealing party in the original appeal is also significant. As the non-appealing party, PG&E had no standing to raise errors. It could only meet the errors complained of by Sierra and seek to support the Commission's order "on the grounds invoked" by the Commission. (*S.E.C. v. Chenery Corp., supra*, 332 U.S. 194, 196 (1947); see also *Landram v. Jordan*, 203 U.S. 56, 62 (1906), and *F.T.C. v. Pacific etc. Ass'n*, 273 U.S. 52, 66 (1927).) PG&E, therefore, could not urge that the Commission was in error in deciding the case solely on the ground it did rather than on the additional ground urged by PG&E (*viz.*, that the parties agreed the rate was to change with PG&E's

P-31 rate). Of course, PG&E could (and did) point out erroneous statements of "fact" in Sierra's briefs on appeal. But this was not the assignment of any error in the proceedings below; it was done to avoid any chance that Sierra might claim[1] that PG&E acquiesced in Sierra's statement of "fact" on matters where no findings had been made by the Commission. (See footnote 6, p. 21, memo. cited above.)

In sum, all the Tacoma case holds is that a party cannot litigate in a *collateral* proceding a question which has finally been determined in a direct proceeding on the question. It was clear in the Tacoma case that the question had been finally determined in the direct proceeding because (1) a finding on it had been made by the Commission, (2) an appeal had been available to the party aggrieved by the finding, and (3) such an appeal had been taken and the Commission's decision based on the finding had been affirmed. In the present case the parties are still engaged in the same *direct* proceeding. The issue which has arisen has not yet been determined because (1) no finding has ever been made on it, (2) an appeal from the original decision was not available to the party now requesting such a finding because that party was not aggrieved by the original decision, and (3) the decision originally rendered was reversed and the cause remanded for further consideration because the decision first rendered was rooted in an erroneous theory of law.

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[1] Events have shown that this worry was not unfounded. Despite PG&E's clear record of consistently pointing out its contention as to the meaning of the contract, Sierra has continually tried to argue that PG&E has been "belated" in raising the contract issue, that the issue is "an afterthought," and that it is making its position known only "piecemeal." (See footnote 5, p. 18, PG&E's memo. cited above.) See, most recently, Sierra's statement that "PG&E may not reserve the point for another round of piecemeal litigation" (p. 4, "Supplemental Memorandum of Intervener Regarding City of Tacoma v. Taxpayers of Tacoma, 79 S. Ct. 1209 (1958)".)

As can be seen, the Tacoma case differs from the present one on every point of comparison. The very oppositeness of the facts in the two cases suggests why opposite conclusions are called for in each.

II

Sierra Has Misstated the Contract Issue.

As it has on other occasions,[2] Sierra again states that PG&E seeks to establish that it has a "right to increase the contract rate without Sierra's consent." (Supp. Memo. pp. 3, 4.) This, of course, is not the issue at all. PG&E's contention is that Sierra and PG&E *agreed* that the rate would be changed, upward or downward, commensurately with any change authorized by the California Public Utilities Commission in PG&E's intrastate resale rate (Schedule P-31), the rate used in the 1948 contract. If the parties did so agree, Sierra has already consented to the increase sought in the 1948 contract rate.[3] The issue is whether such agreement was made. To decide this issue, PG&E contends, the Commission must make a finding on the conflicting evidence[4] submitted to it previously as to the significance of the insertion of the P-31 rate in the 1948 contract and, as a further aid in deliberating on this conflicting evidence, should hear the testimony of N. R. Sutherland, whose testimony was not available to the Commission at the time of the original hearing.[5]

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[2] We have previously pointed out a similar misstatement of the contract issue by Sierra. (See last portion of footnote 5, page 18, memo. cited above.)

[3] All PG&E has been trying to do is raise Sierra's rate from the level of PG&E's former instrastate resale rate (Schedule P-31), used in the 1948 contract, to the level of PG&E's new instrastate resale rate (Schedule R) following the change in the resale rate authorized by the California Commission. Sierra admits this, and the Commission in its original decision points out that this is the rate relief PG&E seeks. (See pp. 1-2 of the original decision of the Federal Power Commission, Opinion No. 270, issued June 17, 1954. A copy of this opinion is appended as Exhibit "B" of PG&E's "Memorandum of Points and Authorities in Opposition to Intervener's Motion to Dismiss" filed before the Court of Appeals for the Ninth Circuit December 6, 1957, and transmitted by that Court to this Court on April 4, 1958.)

[4] See discussion at pp. 20-22, PG&E's memo cited above.

Sierra's recurring misstatement of the contract issue is a deliberate effort to hide the real issue on which Sierra's position is indefensible.

Respectfully submitted,

F. T. SEARLS
FREDERICK W. MIELKE, JR.
MALCOLM A. MACKILLOP

ROBERT E. MAY
MAY, SHANNON & MORLEY
Attorneys for Petitioner
Pacific Gas and Electric
Company

Dated: August 19, 1958.

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[5] The substance of Mr. Sutherland's proffered testimony appears in an affidavit which is part of the record before this Court. (See Appendix, p. 39, Petition to Review herein.)

APPENDIX I TO REPLY BRIEF FOR PETITIONER

In the

United States Court of Appeals

for the

District of Columbia Circuit

No. 14,422

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner*

vs.

FEDERAL POWER COMMISSION, *Respondent.*

SIERRA PACIFIC POWER COMPANY, *Intervener.*

ON PETITION TO REVIEW ORDER OF FEDERAL POWER COMMISSION

F. T. Searls
245 Market Street
San Francisco 6, California

Robert E. May
1700 K Street, N.W.
Washington 6, D.C.
Attorneys for Petitioner

Of Counsel:
Frederick W. Mielke, Jr.
Malcolm A. MacKillop
Roger J. Nichols
245 Market Street
San Francisco 6, California

May, Shannon and Morley
1700 K Street, N.W.
Washington 6, D.C.

United States Court of Appeals
For the
District of Columbia Circuit

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APPENDIX I TO REPLY BRIEF FOR PETITIONER

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No. 51

In the Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL POWER COMMISSION, *Petitioner*

v.

SIERRA PACIFIC POWER COMPANY

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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[1]

[Title of Court and Cause Omitted]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on February 24, 1955, as modified on March 23, 1955.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra,* pp. 1a-10a) is not yet reported.

Jurisdiction

The original judgment of the Court of Appeals was entered on February 24, 1955 (App. A, *infra,* p. 10a). Thereafter, on the motion of Sierra Pacific Power Company, the

[2]

Court of Appeals modi-// fied its judgment on March 23, 1955 (App. A, *infra,* p. 11a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 313 (b) of the Federal Power Act.

Question Presented

Whether, under the Federal Power Act, the Federal Power Commission may permit a schedule increasing a public utility's rate for the sale in interstate commerce of electric energy for resale to be filed, become effective, and supersede the existing filed rate upon a finding after full hearing that the increased rate is not unlawful, but without a finding as to the existing rate which the purchaser had contracted for and had not agreed to increase.

Statute Involved

The pertinent provisions of the Federal Power Act, 49 Stat. 838, 16 U. S. C. 791a, *et seq.*, are set out in Appendix B, *infra*, pp. 12a-14a.

Statement

On February 2, 1953, Pacific Gas and Electric Company (P G & E) filed with the Federal Power Commission, pursuant to Section 205 (d) of the Federal Power Act, App. B, *infra*, pp. 12a-13a, a supplement to its Rate Schedule FPC No. 3, proposing to increase its rate for sales of electric energy to Sierra Pacific Power Company for resale [3] by about 28%, or an estimated $419,400 // for 1953 (R. 443).[1] The proposed supplement, which P G & E requested be effective April 6, 1953, sought to substitute increased demand and energy rates for those theretofore used[2] in billing Sierra for approximately 40,000 kw of firm power purchased from P G & E under an agreement entered into on March 4, 1948, for a period of at least fifteen years (R. 428-430, 444).[3]

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[1] The Commission found, without objection, that the sale was in interstate commerce for resale, within the Commission's jurisdiction to regulate (R. 467-468).

[2] The proposed charges and those to be superseded are similar to P G & E's schedules "R" and "P-31", respectively, filed with the California Public Utilities Commission. The former superseded the latter as the rate generally available for intrastate service to resale customers with no generating facilities of their own and purchasing only from P G & E (R. 444).

[3] The proposed supplemental rate schedule would have left unaltered the other terms of the 1948 agreement, including (1) a

In response to the Commission's request for comments, Sierra objected to the increase as unreasonable and unjust and claimed that the 1948 contract rate satisfied the standards prescribed in the Power Act (R. 432).[4] Thereafter, on

March // 13, 1953, the Commission, as authorized by Section 205 (e) of the Power Act, App. B., *infra,* pp. 13a-14a, suspended the proposed increase until September 6, 1953, five months after April 6, 1953, the effective day requested by P G & E, and set the proposal down for hearing (R. 431-434). Subsequently, when the Commission was unable to reach its decision by September 6, the proposed increase became effective, as provided in Section 205 (e) of the Power Act, App. B., *infra,* pp. 13a-14a. However, as further authorized by that Section, the Commission on September 28, 1953, directed P G & E to put into a special reserve the difference between the two rates, subject to refund should the Commission find any portion of the increased rate to be unjustified (R. 440-442).

Meanwhile, Sierra petitioned for leave to intervene in the proceeding and also requested the Commission to reject the proposed supplement as improperly filed on the ground that contract rights may not be changed under the rate filing and suspension provisions of Section 205 of the Power

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provision that Sierra purchase from P G & E 4,000 kw of standby capacity for hydroelectric plants maintained on its system, (2) the fifteen year term provision, (3) a minimum bill provision, and (4) a provision preventing Sierra from building additional generating facilities or from obtaining additional energy from any source other than P G & E (R. 444).

[4] The California Public Utilities Commission refused to comment since a similar application filed by P G & E was then pending before it. The Nevada Public Utility Commission opposed the increase because of the contractual arrangement between P G & E and Sierra and requested a hearing (R. 432, 435-437).

Act (R. 445). The Commission permitted Sierra to intervene but denied the request that the supplement be rejected —without prejudice, however, to Sierra's right thereafter to press these contentions (R. 445-446).[5]

[5]

At the hearing, Sierra renewed its contentions that the proposed supplement should be rejected as an unauthorized attempt to alter contract rights. In addition, it urged the Commission to find the 1948 contract rate reasonable and the proposed increase unreasonable. It claimed that it had given up opportunities to meet its power requirements from other sources, notably from the United States Bureau of Reclamation, in reliance upon the binding effect of all terms of the 1948 agreement, and consequently that to change the rate and leave the other provisions of the 1948 contract unaltered would be grossly unfair (R. 450).

In its opinion and order, entered after oral argument followed by further hearings and argument,[6] the Commission pointed out that "on each of the several previous occasions * * * we have rejected any contention that an abrogation of contract rights may not be worked by the operation of the statutory rate filing and suspension provisions" (R. 458-459). Stating that "even a cursory examination will show that the provisions of Section 205 expressly authorize the alteration of contracts" (R. 461), the Commission went on to rule that the filed rate procedure provided in Section

[6]

205 imposed no requirement that the old // contract rate

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[5] Sierra's petition for rehearing on this denial was dismissed because it related only to an interlocutory and procedural ruling, not a final decision by the Commission (R. 446).

[6] By this agreement, the intermediate decision procedure was omitted (R. 446).

must be found unlawful before a new rate can take effect (R. 462):

> * * * There is nothing in that section that qualifies or limits the right and duty placed upon the seller to maintain rates which satisfy the statutory standard by any requirement for the consent of the buyer or for a Commission finding with respect to the former contract rate. The sole condition is that the filed rate may not become effective in less than 30 days (unless the Commission otherwise orders) and the Commission may suspend any filing and prescribe a rate in lieu thereof if, after hearing, it finds that the changed rate proposed by the suspended filing is unlawful.[7]

As to the reasonableness of the proposed rate, the Commission refused to depart from the cost-of-service method it usually followed in such situations (R. 450). It found "unconvincing" Sierra's claim that it had foregone other sources of supply in reliance upon the continuance of all terms of the 1948 agreement since "the record * * * clearly shows that in 1948 Sierra regarded the other sources of supply as being so unacceptable that P G & E became, in

[7]

fact, the only feasible source" // (R. 451).[8] In addition, the Commission, relying on the principle that a public utility cannot by contract place its rates beyond the reach of regulation, rejected Sierra's argument that the competitive aspects of the 1948 negotiations necessarily made the negotiated rate just and reasonable (R. 451). Finally, it noted that even if it accepted the 1948 contract as demonstrating the rate of return reasonable for Sierra's business, "due to the increases in other costs which have occurred since then the presently proposed increase will merely restore that rate of return, not go above it" (R. 452).[9] Consequently, since it was of the opinion that the proposed rate would provide no more than a fair return on the portion of P G & E's net investment rate base properly allo- [8] cable to that service (R. 469),[10] the Commis- // sion concluded that the proposed rate was not unlawful and terminated the proceeding (R. 470).[11]

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[7] In this connection, the Commission noted that "if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful" (R. 464).

[8] In regard to Sierra's contention that it would be grossly unfair to change the 1948 rate and leave all other terms unaltered, the Commission said that "Sierra has not shown, and on cross examination its president could not suggest any alterations which he thought should be made in other terms if the rate were changed as proposed" (R. 451).

Sierra sought review of the Commission's order in the court below. That court held that, where a public utility seeks unilaterally to raise a rate filed with the Commission in contract form, there must be a Commission finding under

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[9] Using P G & E's method of computing the rate of return which would result from the revenues produced by the proposed rates and applying it to the revenues which were anticipated under the 1948 contract at the time it was entered into, the Commission determined that there was no substantial difference between the reasonably foreseeable rates of return (R. 452-453).

[10] Although 5½% is generally a reasonable rate of return on P G & E's electric utility business, and the proposed rate would under the Commission's computation result in a 4.75% return, the Commission did not regard the 0.75% deficiency as a basis for rejecting the proposed rate in view of P G & E's willingness to absorb the deficiency (R 464-465).

[11] Two Commissioners dissented on the ground that, in the circumstances, the proposed rate was unreasonable and the 1948 contract rate should be continued because not unjust, unreasonable, or unduly discriminatory (R. 471-477).

Section 206 (App. B, *infra,* p. 14a) that the existing rate is unjust or unreasonable before the new rate may be permitted to become effective (App. A, *infra,* pp. 4a-9a). Since the Commission had not found the 1948 contract rate to be unreasonable, the court set the order aside and remanded the case to the Commission with instructions to dismiss the proceeding entirely or for further proceedings in the same case under Section 206 (a) (App. A, *infra,* pp. 9a-10a). In so holding, the court placed primary reliance upon the reasoning and the materials cited, as well as the ruling, in *Mobile Gas Service Corporation v. Federal Power Commission,* 215 F.2d 883 (C. A. 3) (App. A, *infra,* pp. 6a-8a),

certiorari granted, Nos. 436, 556, this // Term. On March 23, 1955, the court modified its order by deleting the permission to continue the present case with further proceedings under Section 206 (a) (App. A, *infra,* p. 11a) so that the Commission is now required to dismiss the case and start anew.[12]

Reasons for Granting the Writ

The holding of the Court of Appeals for the District of Columbia Circuit presents substantially the same question under the Federal Power Act as is raised by the decision of the Court of Appeals for the Third Circuit in *Mobile Gas Service Corp. v. Federal Power Commission,* 215 F.2d 883, in regard to the Natural Gas Act, *i.e.,* the proper procedure to be followed by the Federal Power Commission when a public utility or natural gas company seeks to increase its rates to a purchaser for resale where the existing rate is embodied in a contract and the purchaser has not consented to the increase. In *Mobile,* the Third Circuit held that the filed rate procedure provided by Section 4 of the Natural Gas Act is inapplicable in such a situation and that the rate increase may be allowed only after a Commission determination, made after hearing, under Section 5 of the Gas Act that the existing rate is unjust and unrea-

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[12] The effect of the modification, if upheld, is to nullify the challenged rate increase, to reinstate the 1948 rate, and in effect to require the excess over the 1948 rate collected by P G & E to be paid over to Sierra.

[10]

sonable. Relying primarily on the // Third Circuit's holding and reasoning in *Mobile,* the District of Columbia Circuit entered similar rulings in the instant case with regard to comparable provisions (Sections 205, 206) of the Federal Power Act.

This Court has already granted the Commission's petition for a writ of certiorari in *Mobile,* No. 556, this Term. See also *United Gas Pipe Line Co. v. Mobile Gas Service Corp.,* No. 436, this Term. The reasons for granting the writ set out in the Commission's petition in that case (at pp. 6-24) are applicable in the instant case and are incorporated herein by reference. In addition, the superficial inequity which apparently underlay the *Mobile* holding[13] is not present here. For, as authorized by Section 205 (e) of the Power Act (App. B, *infra,* pp. 13a-14a), the Commission, pending the outcome of the hearing, suspended the proposed increase for five months, and thereafter permitted the increase to become effective, subject to refund should any part of the increase be found to be unreasonable. Also, the Commis-

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[13] As pointed out in the petition in No. 556 (at pp. 20-23), this superficial inequity may be more fanciful than real. Moreover, under the scheme adopted by Congress for allocating the losses necessarily incident to the time needed for rate investigations, the burden imposed on a purchaser of gas for industrial resale by the prohibition against suspension of the increased rate pending the completion of the administrative hearing was roughly balanced by the loss incurred by the gas company in connection with the suspension of its rate increases for sales for resale for other uses.

sion has here completed a full hearing as a result of which it has found that the proposed increase was reasonable. Consequently, unlike *Mobile,* Sierra has affirmatively benefited from the filed rate procedure; not only was the cost of the increase, which Sierra bore during a portion of the period of the administrative proceeding, subject to adjustment were the Commission ultimately to find any part of the increase unreasonable, but also Sierra was relieved of paying the increase entirely during the five-month period of suspension despite the Commission's ultimate finding that the increase was reasonable.

Conclusion

For the foregoing reasons, as well as those set out in the Commission's petition in No. 556, this petition for a writ of certiorari should be granted. Since the present petition involves the Federal Power Act and No. 556 involves another statute, the Natural Gas Act, and since the posture of the instant case is different from that in No. 556, we believe that the petition should not be held pending disposition of No. 556, but that it should be granted and separate argument had.

Respectfully submitted,

Simon E. Sobeloff,
Solicitor General.

Willard W. Gatchell,
General Counsel,
Federal Power Commission.

April 1955.

[No Number]

In the Supreme Court of the United States

No. 53

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner*

vs.

SIERRA PACIFIC POWER COMPANY

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

[i]

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[1]

[Title Court and Cause Omitted]

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Pacific Gas and Electric Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 24, 1955, and modified by order of said Court entered March 23, 1955, in a proceeding entitled "Sierra Pacific Power Company, Petitioner, v. Federal Power Commission, Respondent, Pacific Gas and Electric Company, Intervener."[1]

[2]

Opinions Below

The opinion of the Court of Appeals and its order of modification are printed as Appendices A and B hereto. The pertinent opinion and order of the Federal Power Commission is printed as Appendix C hereto. These opinions have not, as yet, been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 24, 1955 and the order of modification thereof was entered on March 23, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act.

Questions Presented

1. Does the rate filing procedure prescribed by Section

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[1] In case No. 736 the Federal Power Commission is seeking review of the same judgment. The record here is the same as that in the Commission's case.

205 of the Federal Power Act for obtaining a rate increase apply to Petitioner's rate for electric power service to Sierra Pacific Power Company, such rate being embodied in a contract between the two companies?

2. Is a contract specified rate outside Commission control as long as such rate is within the judicially-determined zone of reasonableness?

3. Should the Commission, having originally granted full hearing and received evidence on the issue of the unreasonableness of the contract rate be precluded on remand from considering the case further and making a formal finding on that issue after its order has been set aside by the Court of Appeals for lack of such a finding?

Statute Involved

The pertinent provisions of the Federal Power Act, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*, frequently referred to herein as the "Act" are printed as Appendix D hereto.

[3]

Statement

The ultimate question in this proceeding is whether Petitioner, Pacific Gas and Electric Company, (hereinafter called PG&E) is entitled to an increase in its rate for wholesale electric power service to Sierra Pacific Power Company (hereinafter called Sierra).

Since 1923 PG&E has supplied increasing amounts of power at Donner Summit in California to Sierra, which in turn has resold the major part of the power to its retail customers in Nevada, though a portion has been resold in California. Sierra owns and operates five small hydroelectric generating plants, but relies primarily on PG&E for its power supply, paying $1,228,138 therefor in 1952.

In 1948 PG&E entered into the third of the series of contracts under which these power deliveries were made. In the light of *United States v. Public Utilities Commission*, 345 U.S. 295 (1953), the jurisdiction of the Federal Power Commission over all sales under the contract is clear and the Commission has so found.[2] Like the contract which is superseded, the 1948 contract was filed with the Federal Power Commission, which designated it as PG&E's rate schedule F.P.C. No. 3 and fixed its effective date as of January 1, 1948.

At the time the contract was entered into, PG&E supplied power to Sierra over two 60,000 volt transmission lines. The contract required PG&E to construct an additional line for operation at 110,000 volts and, when Sierra's load should require it, to provide another 110,000 volt line. The contract was to terminate fifteen years from the date the first 110,000 volt line was placed in service, but if the second 110,000 volt line was required within that time then the term was to extend until fifteen years after that line was

[4]

placed in service. The first 110,000 volt line was placed in service in 1949 and the evidence showed that the second line will be required in 1956. The contract will, therefore, cover a period of about 23 years, ending in 1971.

On February 2, 1953, in order to meet a very substantial increase in its costs, PG&E initiated the present proceeding by filing with the Federal Power Commission a proposed increase in the Sierra rate, designated Supplement No. 1 to Schedule F.P.C. No. 3. On March 13, 1953, the Commission ordered a hearing concerning the lawfulness of the proposed increase and ordered suspension thereof for five months following the proposed effective date of April 6, 1953. Sierra intervened and requested the Commission to reject the filing on the ground that, because the rate was embodied in a contract, no increase could be filed under Section 205(d) of the Act or otherwise made effective except by a proceeding under Section 206(a) of the Act in which the Commission first determined that the contract specified rate was unlawful.

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[2] Appendix C, p. 33.

The Commission granted permission to intervene, but refused to reject the filing, preserving to Sierra its right to maintain its contentions thereafter. Hearings were held by the Commission on nine days in April and May, 1953, at which all parties were afforded full opportunity to present evidence in support of their contentions. In the briefs filed thereafter PG&E requested a finding that the contract rate was unreasonable and Sierra requested a contrary finding. Oral argument was had before the full Commission, following which, on September 21, 1953, the Commission ordered reargument on specified questions. Further hearings were held on two days in March 1954, and the matter was again argued orally before the full Commission.

In the meantime, on September 6, 1953, the increased rate became effective subject to a Commission order requiring accounting for the amount of the increase collected, to permit refund of any portion thereof not found justified.

On June 17, 1954, the Commission issued its Opinion and Order Terminating Proceeding[3] in which it found, among other things, that the proposed increased rate was not unreasonable, unjust or unlawful. This finding was based on evidence that PG&E would earn only a 4.75% return from its sales to Sierra. The Commission recognized, however, that other considerations than cost of service could affect the reasonableness of the rate. It, therefore, carefully reviewed Sierra's evidence and contentions that the existence of the contract and alleged circumstances surrounding its negotiations made the old contract rate still reasonable despite the decline in rate of return to 2.6%. The Commission concluded that sufficient reason had not been shown for departing from the cost of service, (i.e. rate of return) standard and gave its reasons at length.[4] The court below did not question this portion of the Commission's opinion or the findings based thereon.

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[3] Appendix C hereto. Two Commissioners dissented but did not discuss the question of law on which the Court of Appeals determined the case.

The Commission separately considered Sierra's contention that the contract specified rate must first be found unlawful before a new rate could take effect and rejected it on grounds that may be concisely summarized as (1) that all rates, including contract specified rates, fall within the scope of Section 205 of the Federal Power Act, and (2) that Section 205 does not require such a finding.[5] Nevertheless,

the Commission considered the evidence in the light of Sierra's contentions and concluded that if such a finding "were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful."[6] This conclusion, together with the rest of the Commission's opinion, was, expressly incorporated by reference in the Commission's findings.[7]

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[4] Appendix C, pp. 16 to 22.

[5] Appendix C, pp. 26 to 29.

[6] Appendix C, p. 30.

[7] Appendix C, p. 31.

Sierra's petition for rehearing was denied by the Commission and it petitioned the Court of Appeals for the District of Columbia Circuit for review. The court of appeals, in a decision rendered February 24, 1955, directed that the Commission's order be set aside and the case remanded with directions either to dismiss the proceeding or for further proceedings under Section 206(a) of the Act, on the ground that the contract specified rate could not be increased except by a proceeding under Section 206(a) of the Act in which a finding is made that the contract specified rate is unlawful.

On March 23, 1955, in response to a motion by Sierra, the court modified its order to direct the Commission to dismiss the proceeding, but without prejudice to the initiation of a new proceeding under Section 206(a).

Reasons for Granting Certiorari

1. This case involves interpretation of an important provision of a major federal statute regulating interstate commerce. It involves the extent of the authority granted to the Federal Power Commission by the Federal Power Act to regulate rates for the sale of electric energy at wholesale in interstate commerce. Particularly, the case involves the effect of private contracts upon the exercise of such regulatory power. The continuing importance of the subject matter of the case is, therefore, obvious and needs no elaboration.

2. The opinion of the court below clearly errs in the approach to the problem and in the conclusion reached. The result is that by reading an exception into Section 205(d) of the Act, the court makes a distinction between procedures applicable to rates embodied in contracts and those appli-

cable to rates embodied only in tariffs. The Act itself makes no such distinction. Considerations of policy do not favor such a distinction and there is no warrant for believing that Congress ever intended such a distinction. The Court, however, by making the distinction, narrowly and unnecessarily limits the application of the refund procedure provided by Section 205(e) of the Act to minimize losses resulting from regulatory delays.

3. Moreover, in making the distinction, the court seriously impairs the powers of the Commission. The court decides that the Commission has no power to fix the exact level of just and reasonable rates for a utility service where the wholesaling public utility and the distributing company have made a contract specifying the rate for that service. The court held that the Commission may take only a judicial approach to contract specified rates and that it may not change such rates where they lie within the judicially permissible area. The special competence of the Commission

to determine what is the particular reasonable rate for a given service is not to be allowed to come into play in such cases. This drastic limitation upon the Commission's powers should be carefully reviewed by this court to determine whether Congress intended such a result.

4. The decision below is based in large part on the opinion of the Court of Appeals for the Third Circuit in *Mobile Gas Corporation v. Federal Power Commission,* 215 F.2d 883 (1954), a case arising under rate regulation provisions of the Natural Gas Act,[8] which were based upon the

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[8] 52 Stat. 821, 15 U.S.C. 717-717w; cf. Sections 205 and 206 of the Federal Power Act with Sections 4 and 5 of the Natural Gas Act.

earlier Federal Power Act. This case, however, was taken up on writs of certiorari shortly after the decision in the case at bar and is now pending before this court.[8a] The reasons advanced in the petitions for certiorari in the *Mobile* case are, in the main, applicable and equally important here, but the several differences between the Natural Gas Act and the Federal Power Act should also be considered by this court. In particular, it should be pointed out that the decision of the court below deprives the petitioner of the equitable refund procedure available to it under Section 205(e) of the Power Act, resulting in the possibility, if not certainty, of a major windfall to Sierra. The decision unnecessarily gives Sierra the benefit of regulatory delay. In the *Mobile* case, on the other hand, the choice was not between the use of an equitable procedure and one giving the benefit of delay to a particular party; under the Natural Gas Act provisions applicable to that case, the choice lay between placing the burden upon one party or the other. The possibility of minimizing the burden by an equitable refund procedure was not there present.

5. According to the court below, the only error committed by the Commission lay in the failure to make a finding as to the present reasonableness of the contract specified rate. It is clear, however, that the Commission made such a finding on the basis of issues fully and expressly litigated before it. That this finding appears in the Commission's opinion, rather than its formally enumerated findings, is immaterial since the opinion was expressly made a part of the findings.

6. Having found error because of the omitted finding,

[8a] Case Nos. 436 and 556.

the court below erroneously ordered dismissal of the case, directly contrary to applicable precedents of this court.[9] Having pointed out the error, the court should have permitted the Commission to reconsider the matter so that neither party would be unjustly enriched because of the Commission's error.

The statements of fact by the court below ignore certain findings of the Commission and are directly contrary to the record in certain respects. Since these errors are not material to the basis of the court's decision, we are not concerned with them here and will not enumerate them in this petition. The argument which follows points out the correct construction of the pertinent provisions of the Federal Power Act (Point I), the error in the approach made by the court below (Point II), the reasons why the contrary interpretation should have been made (Point III), and the serious effect of the court's interpretation upon the Commission's regulatory powers (Point IV). Finally, the argument points out the clear error and unjust effect of the court's directions for remand, and the resulting interference with the Commission's powers (Point V).

I.

The Language of the Federal Power Act Applies the Rate Filing Method of Initiating Rate Increases to All Rates, Without Distinction.

Sections 205 and 206 of the Act set forth the general scheme for regulation and control of power rates subject to the jurisdiction of the Federal Power Commission.

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[9] *Florida v. United States*, 282 U.S. 194, 215 (1931); *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301 (1935); *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

Section 205 sets up the plan for the day-to-day functioning of regulation. First, this section imposes the primary duty upon regulated utilities to charge only just and reasonable rates without discrimination or preference. Second, these utilities are required to file with the Commission their schedules of rates and charges. Third, the method is set up by which the utilities are to change their rates to make them just and reasonable. A statutory waiting period permits the Commission to review any change in a rate before it becomes effective. The Commission may if it is not then satisfied, or if it receives a complaint, hold hearings to determine the lawful rate, suspend any proposed increase for five months, and order refund of any increase collected after the five months' suspension to the extent that the increase is not proved by the filing utility to be reasonable.

It should particularly be noted that this section refers to *all* rates and charges. Congress did not distinguish between rates embodied in tariff schedules and rates embodied in contracts. A contract rate clearly becomes effective by reason of the filing, not by operation of the contract.[9a] In fact, when referring to contracts in Section 205, Congress described them as contracts "relating to" rates and it may fairly be concluded that Congress had in mind that contracts would relate to rates, not fix them.

[11]

The language of Section 205(d) reads in part:

> "* * * no change shall be made by any public utility in any such rate * * * or contract relating thereto, except after thirty days' notice * * *. Such notice shall be given by filing * * * new *schedules* * * *" (Emphasis supplied.)

[9a] *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951).

It is notable that both a rate and a contract may thus be changed by filing a "schedule." If this wording is effective to permit rates to be changed by a filing, as all admit, it must be equally effective to permit a contract relating to rates to be changed by a filing.

It is, of course, possible that a utility might fail in its duty to determine and file just and reasonable rates. Section 206(a), therefore, gives the Commission authority, on its own motion or on complaint, to determine whether an existing rate is just and reasonable, and if not, to fix the just and reasonable rate.

The Court below holds that the present proceeding should have been initiated under the latter section. But Section 206(a) was framed to authorize complaints about public utilities, not by them. Except to eliminate a preference in favor of some customer, the section seems to contemplate that any resulting revision of rates would be downward. Otherwise, it is difficult to explain the fact that, although Section 205(e) expressly places the burden on the public utility to show that an increased rate is just and reasonable, no corresponding requirement is expressed in Section 206(a). It is also difficult to explain why the court below interprets the Act to require a procedure which the utility is to initiate by a complaint against itself.

The scheme of regulation described in Section 205 is not unusual or unique and is often referred to as the "filed rate" policy. Cases from Arkansas, Colorado, Missouri, New York

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and Pennsylvania have permitted filed rate increases to take effect for service rendered under contract.[10] A recent decision of the Illinois Supreme Court shows that the "filed rate" policy is accepted in that state.[11]

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[10] *Harrison Electric Co. v. Citizens Ice & Storage Co.*, 149 Ark. 502, 232 S.W. 932 (1921); *Denver & S. P. Ry. Co. v. City of Engle-*

Wichita R. R. v. Public Utilities Comm., 260 U.S. 48 (1922), referred to by the court below, does not aid in interpreting the Federal Power Act because that case was decided upon the express assumption that the Kansas statute involved did not adopt the "filed rate" procedure.

II.

The Choice Does Not Lie Between a Procedure Which Abrogates Contracts and a Procedure Which Does Not.

The foregoing description of the regulatory scheme of the Act was not, however, accepted by the court below. Adopting a suggestion by Sierra, it stated:

> "The novel and important question for decision is whether and to what extent the pre-existing right of utilities to enter into enforceable rate contracts has
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> been abrogated by the Commission's power under the Act to regulate rates."

This raises a false issue. All contracts for public utility service are subject to the exercise of the legislative power

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wood, 62 Colo. 229, 161 Pac. 151 (1916), writ of error dismissed 248 U.S. 294, 39 S.Ct. 100 (1919); *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 57 S.Ct. 345 (1937); *North Hempstead v. Public Service Corp.*, 231 N.Y. 447, 132 N.E. 144 (1921); *Public Service Commission v. Pavilion Natural Gas Company*, 232 N.Y. 146, 133 N.E. 427 (1921); *Suburban Water Co. v. Borough of Oakmont*, 268 Pa. 243, 110 A. 778, 781 (1920). See also *Duquesne Light Company v. Public Service Commission*, 273 Pa. 287, 117 A. 63 (1922); *Leiper v. Baltimore & P. R. Co.*, 269 Pa. 228, 105 A. 551 (1918); *V. & S. Bottling Company v. Mountain Gas Company*, 261 Pa. 523, 104 A. 667 (1918) appeal dismissed 251 U.S. 544, 64 L.Ed. 406, 40 S.Ct. 218.

[11] *Antioch Milling Company v. Public Service Company of Northern Illinois*, 123 N.E. 2d 302 (Ill. 1954).

of regulation.[12] The possibility of change by regulatory powers does not nullify or abrogate such contracts. We are concerned here to determine how the Act specifies that contracts shall be changed, not whether they shall be changed. All this is, of course, conceded by Sierra and assumed by the court below.

They insist, however, that to apply the "filed rate" process of the Act to contracts is to abrogate or nullify all rate contracts subject to the Act. Clearly, this does not follow. The possibility of change is inherent in all public utility service contracts. That the change may be initiated by a rate filing by one of the parties (or, indeed, by a complaint by the other) does not nullify the contract. The "filed rate" procedure is well recognized, as we have shown,[13] and where it is prescribed any public utility service contracts which specify rates must imply the use of that procedure.[14] That

the use of contracts subject to the "filed rate" procedure is desirable is eloquently demonstrated by the situation in the natural gas industry. There, numberless rate increases have been instituted since the war by filings under Section 4(d) of the Gas Act and almost without exception they involve sales made under contracts which in some manner specify the rates to be charged. Yet, new contracts are being made every day for gas sales subject to the Gas Act. The point is that both pipeline and distributing companies, accepting the "filed rate" process as a fact, still find contracts useful to establish conditions of sale for the time being.[15]

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[12] "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." *Munn v. People of Illinois,* 94 U.S. 113 at 134.

[13] Supra, notes 10 and 11.

[14] See e.g., *Suburban Water Co. v. Borough of Oakmont,* supra, at p. 781, where the Pennsylvania Supreme Court said in

It is not true, therefore, that the court below was choosing between a mode of regulation which abrogated contracts and one which did not. The only choice to be made was between two methods by which such contracts could be changed.

These considerations also dispose of the court's adoption of a restrictive rule of interpretation because the taking away of a "common law right" was involved.[16] No one has a right to a particular mode of regulation[17] and the contract here in question was entered into 12 years after the filed rate procedure of the Power Act was adopted.

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holding that a filed rate may supersede a contract rate: "All public service contracts are viewed in the light of having been made with an implied provision that the rate named therein is subject to change, according to law, so as to keep it reasonable and non-discriminatory at all times."

[15] The absence of any reported challenge to the application of the filed rate process under either the Power Act or the Gas Act prior to the present case and the *Mobile* case should have some weight, too.

[16] Appendix A, p. 4.

[17] See *Munn v. People of Illinois,* supra, note 12.

III.

As a Matter of Policy, as Well as of Interpretation, the Application of the Rate Filing Procedure to Contract Specified Rates Is Essential.

We turn to a comparison of the procedure under Section 205 with that under Section 206(a) to ascertain whether as a matter of policy, it is reasonable to conclude that Congress intended what it said when it prescribed the filing procedure for all rates without distinction.

1. The Filing and Review Procedure of Section 205 Assures Commission Control of Rates Without Unnecessary Administrative Burden.

Under Section 205 a filed increase may become effective without formal, affirmative Commission action whereas under Section 206(a) a hearing and order is required in all cases. However, this is not to say that under Section 205 the utility may act arbitrarily in filing a rate increase. At least thirty days must elapse between the date of filing and the effective date of the new rate. The Commission has, by rule, enlarged the notice period to sixty days for increases in rates and has required the utility to file detailed information in support thereof.[18] Thus the Commission has basic data and full opportunity for review of each filing.

In any case where the Commission is not satisfied with the supporting data or in which it receives a protest (as in the instant proceeding) it may order a hearing to determine and fix the just and reasonable rate. Section 205(e) authorizes the Commission, after full hearings, to make such orders with reference to the rate in question as would be proper in a proceeding initiated after the rate had become effective, i.e., in a Section 206(a) proceeding. Thus, in any contested increase proceeding, the Commission's powers are identical under either section.

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[18] 18 C.F.R. Section 35.3(c).

The procedure just described constitutes due process of law whether applied to rates embodied in tariffs or to rates embodied in contracts.[19] There is nothing in the procedure which makes it any less legal, equitable or practicable in one situation or the other.

2. The Refund Procedure of Section 205 Minimizes the Hardship of Regulatory Delay and Should Be Used as Extensively as Possible.

Section 205(e) permits a contested rate increase to become effective, subject to refund, after a five months' suspension period, whereas under Section 206(a) no change in rate can be made until the Commission has held a hearing and made a formal determination. The collection and refund procedure was clearly intended to minimize hardship resulting from delays in the regulatory process. When the just and reasonable rate is finally fixed, the utility must refund, with interest, any excess actually collected during the course of the proceeding. Thus, the utility finally retains and the customer pays only the proper amount.

Under Section 206(a) however, delays will frequently result in a windfall to one party and a loss to the other.

Interpretation, then, should favor the use of Section 205 wherever possible, rather than Section 206(a), from the standpoint of equitable treatment of the parties during a contested rate proceeding. There is no reason why it should not be used where a contract specified rate is involved, and every reason why it should be used.

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[19] See cases cited in note 10, supra.

3. The Filed Rate Procedure of Section 205 Does Not Give the Utility Any More Latitude Than the Complaint Procedure of Section 206(a).

The court below stressed the requirement of Section 206(a) that the existing rate first be found unreasonable before a modification is made. Section 205(e), on the other hand, requires the utility to prove the reasonableness of the new rate and is silent as to the old rate.

These would seem to be two sides of the same coin; if the new rate is reasonable, the old must be unreasonable and vice versa. The court below states, however, that "the statutory purpose may be satisfied by more than one rate."[20] Therefore, it concludes that to permit filed rates to supersede contracts would be to give the utility a choice among reasonable rates and that this should not be permitted if the court can interpret the statute in any other way.

The court, however, has confused judicial review of rates with the actual process of making rates. True, when a court applies statutory standards to a rate, it must be satisfied if the rate falls within a given area. Judges must use yardsticks, not micrometers, in passing upon the actions of regulatory commissions. The more precise evaluation of the various elements of reasonableness is left to the expert administrative body.[21] Obviously, this does not mean that the Commission chooses a rate at random within the statutory area. It weighs the various factors and concludes for itself what is *the* reasonable rate under all the circumstances. This is clearly what Congress intended it to do, for

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[20] Appendix A, p. 5.

[21] The court below quotes from ***Montana-Dakota Utilities Co. v. Northwestern Public Service Co.***, 341 U.S. 246, 251 (1951) the following sentence: "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint." But this court went on to say in the same paragraph: "To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission."

in Section 206(a) it directs the Commission to "determine *the* just and reasonable rate * * * to be thereafter observed and in force."[22]

It may be that the court below visualized the Commission in a Section 205(e) hearing as simply applying to a utility's filed rate the judicial rules for review of a Commission fixed rate. It must be clear that this is not so. The Commission takes into account everything which is relevant to the reasonableness of the rate and determines reasonableness in accordance with its own precise, expert standard. Thus, in the case at bar, the Commission considered in detail (and rejected) Sierra's contention that contract considerations made the rate specified therein reasonable regardless of the subsequent rise in PG&E's costs.[23] The Commission was clearly engaged in carrying out its duty to determine the reasonableness of the rate filed by PG&E, not merely by rules of judicial review, but by exercise of its expert judgment as to reasonableness.

Even if it had judicial room to allow or require a different rate the Commission could not have been compelled to do so merely because of the existence of a contract specifying that rate. The power to choose among the judicially permissible rates was given to the Commission, not to contracting parties.

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[22] Emphasis supplied.

[23] Appendix C, pp. 16 to 22.

Evidencing the Commission's interpretation of its duties is the fact that it found that the existence and circumstances of Sierra's contract did not affect the reasonableness of the filed increase. This clearly disposed of the issue from the regulatory point of view regardless of whether the Commission added, as it did, that any lower rate would be unreasonable.

The burden of proof requirement of Section 205(e) reinforces the conclusion that contracting parties lose no rights under this procedure. The old rate, contract specified

or not, will remain as the effective rate under Section 205 unless the utility satisfies the burden of proof that the increased rate is just and reasonable. The presumption thus is in favor of the *status quo*. Similarly under Section 206(a), if the Commission or a complainant proposes a change in the rate the Commission must find the old rate unreasonable before ordering a change. Again, the *status quo* is favored. The use of the Section 205 procedure therefore does not deprive the purchaser of utility service under contract of any right which he would have had in a Section 206(a) proceeding.

IV.

The Decision Below Permits Private Contracts to Curtail the Rate Determination Powers of the Commission.

The court below holds that the procedure of Section 206(a) must be used where the rate is specified by contract because a contract rate cannot be changed if it lies within the *statutory area* of reasonableness. This is a drastic limitation on the powers of the Commission. Where a contract specified rate is involved, the court would require the Commission to forget its position as an expert, make no use of its special competence as a regulatory authority, and determine whether the rate meets statutory standards from the judicial point of view. The Commission would be deprived of any opportunity to make a precise application of the standards from its expert point of view. The contracting parties would take over the Commission's function of deciding where, within the statutory area, the rate is to be fixed.

Surely, Congress intended no such result. Contract specified rates were subject to change by direct legislative action, within constitutional limits, long before the Power Act

was adopted.[24] In delegating authority over such rates to the Commission, Congress could not have intended to create an area of immunity from change and certainly used no language appropriate to such an intention.

In the *Montana-Dakota* case,[25] this court stated that the Commission's function is to reduce reasonableness to specific terms, in direct contrast to the judicial function of determining whether the rate lies within a permissible area. The Court was dealing there with an attack upon a contract rate so the language is especially appropriate here.

It has never been suggested that the Commission does not have power in the ordinary rate case to determine *the* reasonable rate for a given service. If the language of Section 205(e)—or of Section 4(e) of the Gas Act—is adequate for this purpose in the "ordinary" case, then it is equally adequate for the case involving a contract specified rate.

The severe and unusual limitation which the court below would impose on the Commission's powers, clearly requires examination by this court to determine whether Congress intended such a result.

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[24] *Munn v. People of Illinois, supra,* note 12.

[25] Supra, note 20.

V.

The Refusal of the Court Below to Permit the Commission to Correct Its Alleged Error Was Contrary to Decisions of This Court and Usurped the Commission's Regulatory Authority.

The Commission stated in its opinion herein that, if a separate finding on the lawfulness of the contract rate were necessary, it would have to be that the contract rate was unreasonably low and therefore unlawful. This conclusion

was expressly incorporated in the Commission's formal findings,[26] apparently for the very purpose of avoiding the need for further proceedings in the event that the Commission had misconstrued the law. The court disregarded this conclusion, however, on two grounds. First, it stated that it was based upon a record in which the reasonableness of the contract rate was not in issue, and, second it stated that the Commission carefully avoided a finding on these issues.[27] These statements are clearly contrary to fact. Not only was the issue raised at the outset and evidence introduced thereon, but both PG&E and Sierra requested opposite findings thereon. Furthermore, the Commission gave the issue separate and careful consideration in its opinion, and made its conclusion a part of its findings.[28]

Even so, the court below originally directed the case to be remanded for dismissal "or for further proceedings under

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[26] All of the Commission's opinion was expressly incorporated in its findings and made a part thereof. Appendix C, p. 31.

[27] Appendix A, p. 8.

[28] Appendix C, pp. 30 and 31.

Section 206(a)",[29] thus giving the Commission an opportunity to correct its error. On motion of Sierra, however, the court modified its direction and directed absolute dismissal, but "without prejudice to the initiation of a new proceeding under Section 206(a)."[30]

This is directly contrary to this court's decision in *Florida v. United States,* 282 U.S. 194 (1931) where, in setting aside a rate increase order of the Interstate Commerce Commission for lack of essential findings, this court left the Commission free to make such determinations as the situation might require (282 U.S. at p. 215). This court held in a subsequent proceeding involving the same increase that

when the Commission supplied the necessary findings, the railroad was entitled to retain the increase collected during the course of the first proceeding since the findings showed that the rate then collected was no more than reasonable over the entire period. *Atlantic Coast Line R. Co. v. Florida,* 295 U.S. 301 (1935).

If, as we assume, the court below intended to nullify the entire proceeding in the case at bar, then PG&E would be faced with refunding the very substantial increase collected from Sierra since September 6, 1953, in the face of an express conclusion of the Commission that any lesser rate was unreasonable. This court should not allow the principles of the two cases just cited to be disregarded in such a fashion. At the very least, the Commission should be permitted to make a formal finding on the issue.

The court's order, in effect, substitutes for the rate approved by the Commission a different rate without any determination by either the court or the Commission that the substituted rate is just, reasonable or lawful for the period in question. This is clearly an invasion of the Commission's rate-fixing powers, prescribing a result on procedural grounds which should be reached, if at all, only by Commission action.

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[29] Appendix A, p. 8.

[30] Appendix B, p. 9.

We recognize that it may be contended that the entire proceeding was ineffective because initiated under Section 205 rather than 206(a), but this would indeed be harking back to the days when a common law plaintiff selected a writ at his peril. There can be no question that the Commission is in a position to render a decision in the instant proceeding in accordance with the principles laid down by the court below, if that is required.

As this court recently said in *Federal Power Commission v. Idaho Power Co.*, 343 U.S. 17 (1952), "The guiding principle, violated here, is that the function of the reviewing

[23]

court ends when an error of law is laid bare. At that point, the matter once more goes to the Commission for reconsideration." The ultimate determination to be made by the Commission in the case at bar is the reasonableness of a rate. That determination cannot be made in the first instance by a court nor can it foreclose the Commission from making such a determination.

Conclusion

It is submitted that this case involves questions of major importance in the interpretation and administration of the rate regulation powers of the Federal Power Commission under the Federal Power Act.

It is further submitted that the decision of the court below is so clearly in error and involves such serious consequences that this court should issue a writ of certiorari to review the judgment.

Respectfully submitted,

Robert H. Gerdes
F. T. Searls
245 Market Street
San Francisco 6, California
Robert E. May
Wheat, May and Shannon
520 Shoreham Building
Washington 5, D. C.

Attorneys for Petitioner,
Pacific Gas and Electric
Company

Of Counsel:

John C. Morrissey
245 Market Street
San Francisco 6, California

Dated: April 22, 1955.

[No Number]

In the Supreme Court of the United States

October Term, 1954

No. 51

Federal Power Commission, *Petitioner*

vs.

Sierra Pacific Power Company

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief for Respondent in Answer to Petition for Certiorari

[1]

[Title of Court and Cause Omitted]

BRIEF FOR RESPONDENT IN ANSWER TO PETITION FOR CERTIORARI

The primary issue presented by this petition and the companion petition filed in No. 744 by the Pacific Gas and Electric Company is identical with the issue presented in the petitions of United Gas Pipe Line Company in No. 436 and the Federal Power Commission in No. 556, both against Mobile Gas Service Corporation, as respondent, in which certiorari was granted by this Court. That issue is whether a contract between two utility companies for the purchase and sale of gas (here electric power) at a fixed rate for a term of years, which contract has been accepted for filing by the Federal Power Commission,

[2]

remains legal and binding until and unless the contract is found to be against the public interest by the Federal Power Commission, or whether such a contract may be abrogated unilaterally at any time by the selling company by the mere filing of a schedule of higher rates, regardless of the reasonableness of the contract rate.

Our contentions in support of the decisions below are fully set forth in our briefs filed with this Court in opposition to the petitions for certiorari in Nos. 436 and 556.

The only apparent difference between the two cases is that the case involved in Nos. 436 and 556[1] arose under the Natural Gas Act, whereas the case involved in the present petition[2] arose under the Federal Power Act. However, so far as the basic issue involved is concerned, the two Acts are so substantially identical that a decision by this Court in one would necessarily be controlling in the other. In each case a public utility company had entered into a contract to sell, in the *Mobile* case natural gas, and in the present case electric power, at wholesale to another public utility company for resale by it to its customers, at a fixed rate and for a fixed period of time. Both contracts had been accepted for filing by the Federal Power Commission and therefore constituted the legal rate. In each case the selling company sought to abrogate its contract by the device of merely filing a schedule of higher rates before the Federal Power Commission without obtaining the consent of the purchasing company to such increases in the contract rate, and in each case the purchasing company filed a petition with the Federal Power Commission alleging the existence of the contract and asking that the filing be rejected as unlawful because in

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[1] Hereinafter sometimes referred to as "the *Mobile* case".

[2] Hereinafter sometimes referred to as "the *Sierra* case."

violation of the contract. Both Mobile and Sierra, // the respective purchasing companies, contended that a duly filed rate contract is valid and binding until and unless found to be against the public interest by the Federal Power Commission after a hearing under the appropriate provisions of the respective Acts.

In the *Mobile* case the Commission dismissed Mobile's petition on the ground that the existence of a contract did not prevent the selling company from increasing the rate by the unilateral act of filing a schedule of increases. The Court of Appeals for the Third Circuit reversed the Commission on the ground that the contract was valid and binding until and unless the contract were found to be unreasonable by the Commission in an appropriate proceeding.[3]

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[3] *Mobile Gas Service Corporation v. Federal Power Commission*, 215 F.2d 883 (1954), *cert.* granted, Feb. 28, 1955, Nos. 436, 556.

In the *Sierra* case, the Commission denied the relief sought (that the filing be rejected), but ordered hearings as to the reasonableness of the proposed new rates and reserved Sierra's right to advance its contentions at such hearings. After hearings the Commission (Commissioners Smith and Doty dissenting) held that the proposed new rate was neither exorbitant, discriminatory nor preferential and was therefore lawful, and dismissed Sierra's contentions, holding as it had in the *Mobile* case that the rate provisions in the contract had no binding effect. On petition for review to the Court of Appeals for the District of Columbia Circuit, Sierra urged, first, that the Commission had erred as a matter of law in holding that the contract rate could be unilaterally abrogated without a finding by the Commission that the contract was unreasonable, and, secondly, that in any event, the Commission's finding that the proposed new rate was lawful in the light of the circum-

[4]

stances // surrounding the negotiations of the contract was abritrary, capricious and contrary to the evidence. The Court of Appeals, citing the decision of the Third Circuit in the *Mobile* case, reversed the Commission on the law, holding that the contract rate was valid and binding until and unless it were found to be unreasonable in an appropriate proceeding.[4] Thus the Court of Appeals did not reach the issue raised by Sierra as to whether or not the Commission's order was arbitrary and contrary to the evidence.

It will be seen from the foregoing that the issue decided by the Courts below is identical in each case.[5] Accordingly, while we believe the decisions below in both cases were clearly correct, we recognize that inasmuch as this Court has granted certiorari in the *Mobile* case, justice requires that the instant petition be not denied prior to the decision of this Court in the *Mobile* case.

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[4] The opinion of the Court of Appeals is not yet reported. See Appendix to Petition, pp. 1a, *et seq.*

[5] Petitioner, although conceding that the two cases "present[s] substantially the same question" (Pet. p. 9), asserts that because there has been a hearing and finding as to the reasonableness of the

It is also apparent that while a reversal by this Court on the question of law determined by the Third Circuit in the *Mobile* case would require a reversal of that question in the instant case, such a result would leave undetermined Sierra's contentions in the instant case as to the arbitrary nature of the Commission's findings and order. In order that these contentions may be presented to this Court either as a further ground for sustaining the decision below or as

a ground for remanding the // case to the Court below for further action in the event of a reversal on the question of law, we join with the Solicitor General in requesting that the petition be not held over until the determination in the *Mobile* case, but that it be granted and the case set down for argument on the same day as the *Mobile* case, to the end that all questions in both cases may be fully presented to this Court.

Respectfully submitted,

William C. Chanler,
Attorney for Respondent.

Elliott E. Vose,
Of Counsel.

May 5, 1955.

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new rate, whereas there has been no such hearing or finding in the *Mobile* case, "the posture of the instant case is different from that in No. 556" (Pet. p. 11). We think this is a distinction without a difference. In both cases the purchasing company has been compelled to pay a rate in excess of that provided by its contract for a period of years without any finding as to the unreasonableness of that contract. Under the statutes as construed by the Courts below, such payments were illegal in both cases. The fact that a hearing has been held, resulting in a finding that the proposed new rate was reasonable, is immaterial.

[No Number]

In the Supreme Court of the United States

October Term, 1954

No. 53

Pacific Gas and Electric Company, *Petitioner*

vs.

Sierra Pacific Power Company

On Petition for Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

Brief for Respondent in Answer to Petition for Certiorari

[1]

[Title of Court and Cause Omitted]

BRIEF FOR RESPONDENT IN ANSWER TO PETITION FOR CERTIORARI

The issues raised by this petition are substantially identical with those raised in No. 736, in which we filed a separate brief. As appears from that brief, to which the Court is respectfully referred, while we think that there is no substantial difference between the issue decided by the Court of Appeals in the instant case and that decided by the Third Circuit in the *Mobile** case, and while we believe both cases were correctly decided below, nevertheless, as this Court has already granted certiorari in the *Mobile* case (Nos. 436 and 556), we recog-

[2]

nize that justice requires that the present petition be not denied prior to a decision in the *Mobile* case. Moreover, because one substantial ground in support of our contention that the Federal Power Commission's order should be reversed was not reached or passed upon by the Court below, we join in requesting the Court to grant the present petition and ask that the case be set down for argument on the same day as the *Mobile* case, so that all questions raised in both cases can be fully presented to this Court.

Respectfully submitted,

William C. Chanler
Attorney for Respondent.

Elliott E. Vose,
Of Counsel.

May 5, 1955.

******Mobile Gas Service Corporation v. Federal Power Commission,*** **215 F.2d 883 (3rd Cir., 1954),** ***cert.*** **granted, February 28, 1955, Nos. 436, 556.**

[No Number]

No. 51

In the Supreme Court of the United States

October Term, 1955

Federal Power Commission, *Petitioner*

v.

Sierra Pacific Power Company

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

Brief for the Federal Power Commission

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[1]

[Title of Court and Cause Omitted][1]

BRIEF FOR THE FEDERAL POWER COMMISSION

Opinions Below

The opinion of the Court of Appeals (R. 478-482) is reported at 223 F.2d 605. The opinions and order of the Federal Power Commission (R. 443-477) are reported at 7 PUR 3d 256.

Jurisdiction

The original judgment of the Court of Appeals was [2] entered on February 24, 1955 (R. 483). Thereafter, // on the motion of Sierra Pacific Power Company, the Court of Appeals modified its judgment on March 23, 1955 (R. 495). The petition for a writ of certiorari was filed on April 20, 1955 and granted on May 23, 1955 (R. 496), 349 U.S. 937. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act.

Question Presented

Whether, under the Federal Power Act, the Federal Power Commission may permit a schedule increasing a public utility's rate for the sale of electric energy for resale to be filed, become effective, and supersede the existing filed rate upon a finding after full hearing that the increased rate is not unlawful, but without a finding as to the unlawfulness of the existing rate, where the existing rate is embodied in a contract between the public utility and its purchaser filed with the Commission as a rate schedule, and the purchaser has not agreed to the increase.

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[1] This is a companion case to *Pacific Gas and Electric Company v. Sierra Pacific Power Company*, No. 53, this Term, also pending before this Court on a writ of certiorari. A related question under the Natural Gas Act is presented in *Federal Power Commission v. Mobile Gas Service Corporation*, No. 31, this Term, and its companion case, *United Gas Pipe Line Co. v. Mobile Gas Service Corporation*, No. 17, this Term.

Statute Involved

The pertinent provisions of the Federal Power Act, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*, are set out in the Appendix, *infra*, pp. 39-42.

Statement

Respondent, Sierra Pacific Power Company, distributes electric power to customers in eastern California and northern and northwestern Nevada (R. 5, 467). It purchases 77% of its power requirements from Pacific Gas and Electric Company (PG&E), a "public utility" under Part II of the Federal Power Act (R. 466-7).

Sierra's purchases from PG&E began under contract in

[3]

1923 and continued under agreements entered // into in 1938 and 1948 (R. 6, 261, 443, fn. 1). The 1948 contract (R. 138-146) was negotiated before the expiration of the previous agreement in order to increase Sierra's capacity to meet a growing demand upon its system (R. 6-8, 32-33, 170-171, 199-200, 205-208, 231-232, 264). It provided for the construction of an additional 110 kv line (and, if necessary, a second such line) to supply the additional power (R. 142-144) and for the purchase of Sierra's requirements from PG&E until December 31, 1964, or fifteen years after the new lines went into service, whichever is later (R. 139, 145). Sierra agreed that it would purchase power exclusively from PG&E, except for minor standby and exchange agreements (R. 139). The contract provided a flat charge for standby service and demand and energy charges for firm power service; the rate agreed upon was lower than PG&E's previous rate to Sierra (R. 139-140). This 1948 contract was filed with the Commission as PG&E's Rate Schedule FPC No. 3 (R. 428, 444).

Subsequently, on February 2, 1953, PG&E filed with the Commission the schedule here involved, designated as Supplement No. 1 to its Rate Schedule No. 3 (R. 428-430), increasing its rate to Sierra by about 28%, or by an estimated $419,400 for 1953 (R. 443).[2] The new schedule substituted increased demand and energy charges for those theretofore used in billing Sierra for the approximately

[4]

40,000 kw of firm power purchased // under the 1948 agreement; the other terms of the contract were to remain in full force and effect (R. 428-430, 444).[3] PG&E requested that the new schedule be effective April 6, 1953 (R. 431, 444), thus giving more than the thirty days' notice of rate change required by Section 205(d) of the Federal Power Act, *infra,* p. 39.[4]

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[2] 2. The Commission found, without objection, that the sale was in interstate commerce for resale, within the Commission's regulatory jurisdiction (R. 448, 467-468). The only other PG&E services within the Commission's jurisdiction are its sales to California-Oregon Power Company (R. 456, 469). PG&E's other sales are in intrastate commerce and are subject to regulation by the California Public Utilities Commission (R. 457, 280-283, 411-413).

[3] 3. The proposed charges and those to be superseded are similar to PG&E's schedules "R" and "P-31," respectively, filed with the California Public Utilities Commission. The former superseded the latter as the rate generally available for intrastate service to resale customers with no generating facilities of their own and purchasing only from PG&E (R. 2-4, 444 and fn. 2).

In response to the Commission's request for comments, Sierra objected to the incease as unreasonable and unjust and claimed that, although the 1948 contract rate might fail to provide a fair rate of return, it was just and reasonable because of the circumstances at the time the contract was made (R. 432).[5] Thereafter, on March 13, 1953, the Commission, stating that the increased rates "may be unjust, unreasonable, unduly discriminatory or preferential," entered upon a hearing "concerning the lawfulness of the proposed rates," as authorized by Section 205(e) of the Power Act, *infra,* pp. 40-41 (R. 433). In addition, pending the outcome of the hearing the Commission, acting under the further provisions of 205(e), suspended the proposed rates until September 6, 1953, five months after April 6,

[5]

1953, the effective day requested by PG&E // (R. 433-434). Subsequently, when the Commission was unable to reach its decision by September 6, the proposed increase became effective (R. 440). However, under the authority of Section 205(e), the Commission by further order directed PG&E to put into a special reserve the difference between its charges at the two rates, plus interest, subject to refund should the Commission find any portion of the increased rate to be unjustified (R. 440-442).

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[4] Where a rate increase is proposed by the utility, the Commission regulations require the filing of certain data 60 days prior to the proposed effective date of the increase. 18 C.F.R. 35.3(c)(7).

[5] The California Public Utilities Commission refused to comment since a similar application filed by PG&E was then pending before it. The Nevada Public Service Commission opposed the increase because of the contractual arrangement between PG&E and Sierra and requested a hearing (R. 432, 435-437).

Meanwhile, Sierra petitioned for leave to intervene in the proceeding and also requested the Commission to reject the proposed schedule as improperly filed on the ground that contract rights may not be changed under the rate filing and suspension provisions of Section 205 of the Power Act (R. 445). The Commission permitted Sierra to intervene but denied the request that the schedule be rejected—without prejudice, however, to Sierra's right thereafter to press these contentions (R. 445-446).[6]

At the hearing, Sierra renewed its contentions that the proposed supplement should be rejected. It claimed that Section 205 does not authorize alteration of a contract by the "unilateral act" of a public utility in filing new rates, or by an order of the Commission entered in a proceeding held on the suspension of such filing. Rather, it urged that contracts may be altered only after a rate investigation under Section 206 of the Act, *infra,* p. 41, and upon a finding that the contract rate was unlawful; it also contended that such a finding as to the reasonableness of the existing con-

[6]

tract rate was re- // quired before a schedule filed under Section 205(d) could be permitted to become effective (R. 458). In addition, it urged the Commission to find the 1948 contract rate reasonable and the proposed increase unreasonable. It claimed that the contract rate had been offered by PG&E in order to retain Sierra as a customer; that in reliance upon the binding effect of all terms of the 1948 agreement, Sierra had given up opportunities to meet its power requirements from other sources, notably from the

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[6] Sierra's petition for rehearing on this denial was dismissed because it related only to an interlocutory and procedural ruling, not a final decision by the Commission (R. 446).

United States Bureau of Reclamation; and, consequently, that to increase the rate and leave the other provisions of the 1948 contract unaltered would be grossly unfair (R. 450).

In its opinion and order, entered after hearing and oral argument followed by further hearing and argument, the Commission pointed out that "on each of the several previous occasions when we have been called upon to interpret the scope of Section 205 of the Power Act or the equivalent Section 4 of the Natural Gas Act, we have rejected any contention that an abrogation of contract rights may not be worked by the operation of the statutory rate filing and suspension provisions" (R. 458-459). Noting that "even a cursory examination will show that the provisions of Section 205 expressly authorize the alteration of contracts" (R. 461), the Commission went on to rule that the filed rate procedure provided in Section 205 imposed no requirement that the old contract rate must be found unlawful before a new rate can take effect (R. 462):

> * * * There is nothing in that section that qualifies or limits the right and duty placed upon the seller to
>
> [7]
>
> maintain rates which satisfy the statu- // tory standard by any requirement for the consent of the buyer or for a Commission finding with respect to the former contract rate. The sole condition is that the filed rate may not become effective in less than 30 days (unless the Commission otherwise orders) and the Commission may suspend any filing and prescribe a rate in lieu thereof if, after hearing, it finds that the changed rate proposed by the suspended filing is unlawful.[7]

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[7] In this connection, the Commission noted that "if a finding

As to the reasonableness of the new rate, the Commission found that the rate would provide revenues sufficient to yield a return of 4.75% on a net investment rate base, less than the 5½% return which is generally reasonable for PG&E's electric utility operations (R. 448-449). Despite Sierra's contention that the rate of return was of no consequence here because of the circumstances under which (as Sierra claimed) the 1948 contract was agreed upon (R. 432, 450), the Commission refused to depart from its usual method of testing the reasonableness of rates against the cost of service (R. 450-455). It found "unconvincing" Sierra's claim that it had foregone other sources of supply in reliance upon the continuance of all terms of the 1948 agreement since "the record * * * clearly shows that in 1948 Sierra regarded the other sources of supply as being so unacceptable that

[8]

PG&E became, in fact, the only feasible // source" (R. 451).[8] Relying on the principle that a public utility cannot by contract place its rates beyond the reach of regulation, the Commission also rejected Sierra's argument that the competitive aspects of the 1948 negotiations necessarily made the negotiated rate just and reasonable for the entire duration of the contract (R. 450-451). Finally, it noted that even

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on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful" (R. 464). However, since the Commission regarded the question before it as relating only to the reasonableness of the proposed rates, it did not enter formal findings as to the reasonableness of the 1948 contract rate (R. 469-470).

[8] In regard to Sierra's contention that it would be grossly unfair to change the 1948 rate and leave all other terms unaltered, the Commission said that "Sierra has not shown, and on cross examination its president could not suggest any alterations which he thought should be made in other terms if the rate were changed as proposed" (R. 451).

if it accepted the rate of return then foreseeable under the 1948 contract as reasonable for Sierra's business, "due to the increases in other costs which have occurred since then the presently proposed increase will merely restore that rate of return, not go above it" (R. 452).[9]

Consequently, since it was of the opinion that the proposed rate would not provide more than a fair return on the portion of PG&E's net investment rate base properly

[9]

allocable to that service (R. 469),[10] the Com- // mission concluded that the proposed rate was not unlawful and terminated the proceeding (R. 470).[11]

Sierra sought review of the Commission's order in the court below (R. 478-9). That court held that a contract rate on file with the Commission remains effective until it is found unreasonable by the Commission under Section 206 (a), *infra,* p. 41; and such a rate cannot be increased by the selling utility's filing under Section 205 of a new rate, even though it is found to be reasonable by the Commission (R. 480-1). Since the Commission had not (so the court thought) found the 1948 contract rate to be unreasonable, the court set the order aside and remanded the case to the Commission with instructions to dismiss the proceeding entirely or for further proceedings in the same case under Section 206(a) (R. 482). In so holding, the court placed primary reliance upon the reasoning and the material cited, as well as the ruling, in *Mobile Gas Service Corporation v. Federal Power Commission,* 215 F.2d 883 (C.A. 3) pending on writs of certiorari, Nos. 17, 31, this Term (R. 481-2). On March 23, 1955, the court modified its order by deleting the permission to continue the present case with further

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[9] To compare the rate of return which would result from the revenues produced by the new rate with the return reasonably foreseeable at the time the 1948 contract was negotiated, the Commission used computations made by PG&E and determined that there was no substantial difference between the reasonably foreseeable rates of return (R. 452-453). While the Commission did not accept (without certain adjustments) PG&E's method of computation as comprehensive for purposes of stating the return from the new rates, PG&E's result being too low, that method was sufficient basis for comparing the returns under the two schedules between themselves (R. 452-3). See *infra*, pp. 33-35.

[10] Although 5½% is generally a reasonable rate of return on PG&E's electric utility business, and the proposed rate would, under the Commission's computation, result in a 4.75% return, the Commission did not regard the 0.75% deficiency as a basis for rejecting the proposed rate in view of PG&E's willingness to absorb the deficiency, the ruling of the California Commission preventing a shift of such deficiency to other customers, and the fact that no undue discrimination or preference resulted (R. 464-465).

[11] Two Commissioners dissented on the ground that "the circumstances surrounding the origin and development of existing contractual relationships between PG&E and Sierra have been such as to justify—or in equity to require—special consideratian" (R. 472) and the 1948 contract rate should be continued because not unjust, unreasonable, or unduly discriminatory (R. 471-477).

proceedings under Section 206(a) (R. // 495), so that the Commission is now required to dismiss the case and start anew.[12]

Summary of Argument

I

A. The court below relied on *Mobile Gas Service Corp. v. Federal Power Commission,* 215 F.2d 883, now pending on writs of certiorari, Nos. 17, 31, this Term, in holding that the Commission may not permit new schedules filed by a utility under the filed rate procedure of Sections 205(d) and 205(e) of the Power Act to supersede rates embodied in a contract, and instead must first pass on the reasonableness of the existing contract rate under the complaint-hearing procedure of Section 206. The court below and Sierra have recognized that these provisions of the Power Act are virtually identical with the comparable provisions of the Gas Act involved in *Mobile* (Sections 4(d), 4(e) and 5) and that, despite their slightly different postures, the basic issues in both cases are the same. And since the court below adopted the authorities and theory set out by the Third Circuit in *Mobile* in reaching its conclusion, the discussion in our brief in No. 31 is fully applicable here and the Court is respectfully referred thereto.

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[12] Since in a hearing under Section 206(a) the Commission may fix only a prospective rate, "to be thereafter observed," the effect of the decision below is to nullify the challenged rate increase, to reinstate the 1948 rate, and in effect to require the excess over the 1948 rate collected by PG&E to be paid over to Sierra.

B. While in *Mobile* the Third Circuit felt that the filed rate procedure was inequitable because it resulted in a "squeeze" on Mobile during the pendency of the hearing, there is no such possible inequity to Sierra. Sierra has

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benefited from this procedure because the // new rate was suspended for five months and then went into effect subject to refund. In contrast, the decision below would place a far greater burden upon PG&E, for under it the existing rate would continue in effect until the Commission finds in a new proceeding instituted under Section 206 that the existing rate is unreasonable, and this without any recourse by PG&E against Sierra for the difference in rates during the entire period of both administrative proceedings.

II

As an alternative ground for supporting the judgment below, Sierra has indicated that it intends to press its claim that the Commission's finding, that the new rate is reasonable, is not supported by substantial evidence. The District of Columbia Circuit, as we read its opinion, has recognized that the Commission's finding is amply supported and we discuss Sierra's contention only on the assumption that this Court may nevertheless wish to consider the question.

A. In passing on the reasonableness of the new rate proposed by PG&E—as is concededly proper under the filed rate procedure—the Commission utilized the cost of service test which it usually follows in rate proceedings, whether under Section 205(e) or Section 206. Finding that the new rate would provide a 4.75% return on a net investment rate base allocable to the service and that this was "not more than a fair return"—5½%—the Commission concluded that the rate was not unreasonable or unlawful. The propriety of the use of such cost of service method is well established, as is the propriety of allocating costs to assure that each customer bears its fair share of the overall costs of the utility's operations.

[12]

In addition, while Sierra could not, and did not, complain that the rate was too low, the Commission went on to consider the fact that the 4.75% return would be less than fully compensatory to PG&E. In view of the circumstances, particularly PG&E's willingness to accept the rate and its need to retain the Sierra business, the Commission concluded that the rate was reasonable. The allowance of a rate proposed by a utility which is less than fully compensatory accords with precedent.

B. The Commission rejected Sierra's claim that the usual cost of sevice method is irrelevant here because of the alleged circumstances under which Sierra entered into the 1948 contract with PG&E. Not only do the considerations which underlie the subjecting of contract and other types of rates to change by the same procedures strongly support the application of the same standards in passing on the reasonableness of the proposed rate changes, but the Commission found "unconvincing" Sierra's argument that in 1948 it had contracted with PG&E and foregone other sources of supply in reliance upon continuance of the low contract rates. The record shows that Sierra at that time considered PG&E to be the only feasible source and the alternative, the U. S. Bureau of Reclamation, to be objectionable in many ways.

Similarly, the Commission rejected Sierra's contention that the cost of service test should not be used because in 1948 PG&E took into account only the "incremental" cost of serving Sierra. Moreover, the Commission found that if the foreseeable rate of return from the contract rate when it was negotiated were to be accepted as the continuing

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reasonable return, // the new rate would do no more than restore the rate of return foreseeable in 1948.

Acceptance of Sierra's contentions would result in favored treatment for it. In contrast to the contracts of all PG&E's other customers at equivalent low rates which expire in 1955 and 1956, Sierra's contract has until at least 1964 to run and, should it be given continued effect, would operate to relieve Sierra for at least eight more years from paying its full share of the substantial and unexpected increases in PG&E's costs. It would be unfair thus to allocate the burden of these increased costs among PG&E's customers according to the existence of contracts and the order in which the contracts expire.

Argument

I

The Commission Properly Applied the Filed Rate Procedure Set Out in Sections 205(d) and 205(e) of the Power Act to the New Schedule Filed by the Public Utility, Even Though the Existing Rate Was Embodied in a Contract

A. The Commission's Application of Sections 205(d) and 205(e) Accords With the Terms of the Power Act and the Usual Provisions of Utility Regulatory Statutes.

When PG&E filed with the Commission a new rate schedule for the sale to Sierra, the Commission followed the filed rate procedure which has been long established and which it believes is mandatory under Sections 205(d) and 205(e) of the Federal Power Act, *infra,* pp. 39-41. Since the Commission's preliminary inquiry indicated that the newly filed rate might be unlawful, a hearing was ordered on the reasonableness of the new rate. Pending the out-

[14]

come of that hearing, the Com- // mission suspended the rate for the maximum period allowed by the Act, and when that period expired before the hearing was terminated, and the increased rate went into effect in accordance with Section 205(e), the Commission directed that the difference be held by PG&E, with the excess over a reasonable rate (as ultimately determined by the Commission) subject to refund. After the hearing, the Commission found that the new rate was reasonable and terminated the proceeding.

Since the existing rate superseded by the new schedule thus approved by the Commission had been embodied in a contract between PG&E and Sierra, and Sierra had not agreed to the increase, the court below held that the Commission erred in following the filed rate procedure and should instead have applied the procedure provided in Section 206(a) of the Power Act. While it recognized that "[i]n modifying a filed rate under § 205, it is not necessary to prove that the original rate is unjust or unreasonable; the new rate will take effect if the utility sustains the burden of proving that it is 'just and reasonable'" (R. 480), the court below ruled that where the existing rate is embodied in a contract it may not be changed in the absence of a finding, under the complaint hearing procedure provided in Section 206(a), that the existing rate is unreasonable (R. 480-481).

Noting that the Third Circuit's decision in *Mobile Gas Service Corp. v. Federal Power Commission,* 215 F.2d 883, [now pending on writs of certiorari Nos. 17, 31, this Term,] involved the same issue, *i.e.,* whether the commission may "abrogate a pre-existing contract without any finding that the contract rate was unreasonable" (R. 481), and that the

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language of Sections 4 and // 5(a) of the Natural Gas Act involved in *Mobile* "corresponds almost verbatim" with Sections 205 and 206(a) of the Power Act (R. 481; see also R. 482, fn. 16),[13] the court below held fully applicable here the grounds relied upon by the Third Circuit (R. 481-482):

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[13] Sierra has also conceded that "so far as the basic issue involved is concerned, the two (Power and Gas) Acts are so substantially identical that a decision by this Court in one would necessarily be controlling in the other" (Resp. Br. in Answer in No. 51, p. 2; see also Resp. Br. in Answer in No. 53, p. 1). However, it has been suggested that since Section 206(a) does not spell out, as expilictly as Section 5(a) of the Gas Act, the persons who may invoke the complaint procedure, a selling utility, unlike a selling gas company, may seek a rate change under Section 206(a). See Brief for Petitioner in No. 17, pp. 23, 80-81. However, as we have shown in our brief in *Mobile* (No. 31, p. 23, fn. 11, 36), Section 206(a) has the same effect as Section 5(a) of the Gas Act and the Commission has consistently so construed Section 206(a).

> * * * (1) cases arising under the Public Utility Law of Kansas which contained provisions similar to §§ 4 and 5(a) of the Natural Gas Act; (2) the interpretation of the Gas Act adopted by the Court of Appeals for the Tenth Circuit in Colorado Interstate Gas Co. v. Federal Power Comm.; (3) the doctrine that common law rights will not be impaired without a clear authorization; (4) a colloquy at hearings on a predecessor bill; and (5) the significant lack of debate on the question in view of the drastic impact wholesale abrogation of contracts would have had on the natural gas industry. * * *

The Commission's brief in No. 31 points out in detail the invalidity both of the Third Circuit's ruling and of the grounds upon which it is based. Since the court below relied

on the same grounds in reaching its con- // clusion, the discussion in our brief in No. 31 serves also as an answer here and we respectfully refer the Court to that brief for a detailed explanation of the Commission's position.[14]

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[14] The identity of the issues is not affected by the different posture of the two cases. While in *Mobile* the use of the filed rate procedure to alter contract rates was challenged at the outset, before hearing and order, Sierra attacked a Commission order which found the proposed rate reasonable after a proceeding under the filed rate procedure. The same statutory question is raised in both cases since if the filed rate procedure is properly invoked the Commission could enter into a hearing solely directed to the reasonableness of the proposed rate. See *supra,* pp. 4, 14; *infra,* p. 22, fn. 19. Both the decision in the instant case and *Mobile* were based on statutory grounds and raised no constitutional question, as pointed out in the Commission's Brief in No. 31, p. 25, fn. 13. The instant case is squarely covered by the holding on the constitutional issue in *Midland Realty Co. v. Kansas City Power & Light Co.,* 300 U.S. 109, 114, that the power to fix rates is not dependent upon or conditioned by "specific adjudication in respect of existing contract rates."

In brief summary—as shown more fully in No. 31 (at pp. 23-24 and fns. 11, 12)—the filed rate procedure set out in Sections 205(d) and 205(e) is the only method available under the plain terms of the Power Act to a utility seeking to change its rate. The utility must initiate such changes by filing new schedules under Section 205(d); the Section 206(a) procedure may be invoked only by the Commission on its own motion or by complaint of someone other than the selling utility. This is so even where the existing rate is embodied in a contract, for it is the almost universal rule that contract rates are treated the same as other rates and the terms of the Power Act preclude any distinction between them. See Commission's Brief in No. 31, pp. 25-35. The Commission, in its application of the filed rate procedure and its regulations, has consistently treated rates embodied

in contracts in the same manner // as other rates. See R. 458-60; Commission's Brief in No. 31, pp. 35-40.[15] Contracts are not thereby "abrogated", as feared by the court below (R. 479, 481) and the Third Circuit (No. 31, R. 148), but are merely made subject to change as is customary with utility contracts, in accordance with the methods prescribed by Congress (Commission's Brief in No. 31, pp. 31-33). Consequently, "the doctrine that common law rights will not be impaired without a clear authorization" (R. 481) has no part here.

The Court of Appeals believed that the Commission's construction would have "drastic" results (R. 482), thus following the lead of the Third Circuit, which considered it of a "radical nature" (No. 31, R. 154; Commission's Brief in No. 31, p. 44). But, as we have shown in No. 31, these characterizations are without justification. The legislative history, although meager, indicates that Congress did not intend to differentiate between contract rates and others so far as the applicable procedure is concerned.[16] Moreover, the Commission's reading of the filed rate provisions accords with the accepted construction of the comparable pro-

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[15] The Commission's regulations governing the filing of rates and changes in rates under the Power Act, 18 CFR 35.1-.13, are in this respect to the same effect as the regulations under the Gas Act described in the Commission's Brief in No. 31, pp. 35-40.

visions // of the Interstate Commerce Act, upon which the Power and Gas Acts' procedures were modeled (Commission's Brief in No. 31, pp. 46-55),[17] and also with the similar interpretations of analogous provisions of the overwhelming majority of state public utility regulatory statutes (Commission's Brief in No. 31, pp. 55-71). And this Court, and the state courts with but little dissent, have held that these filed rate procedures may be invoked by utilities to effectuate a change in rates fixed by contract. *E.g., Midland Realty Co. v. Kansas City Power & Light Co.,* 300 U.S. 109, affirming 338 Mo. 1141; *Menasha W. W. Co. v. Minneapolis, St. P. & S. S. M. Co.,* 245 U.S. 633, affirming 159 Wisc. 130;

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[16] While the legislative history of the Power Act, like that of the Gas Act discussed in the Commission's Brief in No. 31, pp. 40-54, does not treat specifically with the present problem, the committee reports on the Power Act, as those on the Gas Act (No. 31, pp. 41-42), describe the filed rate procedure as a method of changing rates applicable to *all* rates of the utility. H. Rep. No. 1318, 74th Cong., 1st Sess., p. 29; S. Rep. No. 621, 74th Cong, 1st Sess., p. 51. In contrast, the colloquy on a predecessor bill to the Gas Act (R. 481-2) was not addressed to the filed rate procedure and so has no bearing on the present problem. See Commission's Brief in No. 31, pp. 42-44.

[17] The similarity between the Power and Gas Acts and their derivation from the Commerce Act are evident from the Acts themselves and have been recognized by Congress and the courts. See Commission's Brief in No. 31, pp. 44-47 and fn. 30, p. 46.

Suburban Water Co. v. Oakmont Borough, 268 Pa. 243, 248-250; *Public Service Commission v. Pavilion Natural Gas Co.,* 232 N. Y. 146, 150-51; *Harrison Electric Co. v. Citizens' Ice & Storage Co.,* 147 Ark. 502, 506-07; see also, *Armour Packing Co. v. United States,* 209 U.S. 56.

Accepting the views of the Third Circuit in *Mobile,* the court below refused to follow *Midland* because it was based on the Missouri court's construction of its statute (R. 482), but chose instead to follow *Wichita RR v. Public Utilities Commission,* 260 U.S. 48, and other cases arising under Kansas law on the ground that they concerned " a comparable requirement in a Kansas statute" (R. 481). However, as is shown in the Commission's Brief in No. 31 at pp. 72-80, Missouri has the usual filed rate procedure corresponding to the Commerce, Power and Gas Acts and is typical of the usual procedure adopted by most states whereas the

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Kansas // procedure differs materially from the usual filed rate procedure and reflects a minority deviation adopted in relatively few states.[18]

B. The Application of the Filed Rate Procedure Does Not Result in Inequity to Sierra.

In *Mobile,* the Third Circuit apparently was influenced in reaching its result by the feeling that since Section 4(e) of the Gas Act expressly prohibited suspension of new rates for industrial resales, such as were there involved, Mobile would be "squeezed" between the new rate for the gas it purchased from United and the lower rate at which it had contracted to sell the gas to the industrial users, and consequently that the application of that procedure would be inequitable to Mobile. The Commission's brief in *Mobile* (at pp. 81-89) shows, however, that this inequity may have been more apparent than real; the way may well have been open to Mobile to seek a higher rate for its resale. In any case, in view of the Third Circuit's recognition that the Commission had authority under the Gas Act to order a higher rate than that embodied in a contract (No. 31, R. 142, 146-8), whatever loss Mobile suffered was limited to the period of the Commission's investigation. Such losses constitute a necessary incident to rate investigations (*Hope Natural Gas Co. v. Federal Power Commission,* 196 F.2d 803, 809 (C.A. 4)), and its falling upon Mobile rather than

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[18] The Tenth Circuit decision in *Colorado Interstate Gas Co. v. Federal Power Commission* (R. 481) is irrelevant since that case involved a proceeding under the hearing procedure of Section 5(a) of the Gas Act and the Tenth Circuit did not purport to pass or express an opinion on the scope or applicability of the filed rate procedure of Section 4. See Commission's Brief in No. 31, pp. 98-99.

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upon United was the result of a // deliberate determination by Congress—in allocating these unavoidable losses—that, while the selling gas company should generally bear the losses, in the single case where the proposed rate is for industrial resale the burden should be on the purchaser.

In the present case, the use of the filed rate procedure results in no possible inequity to Sierra. Not only does Section 205(e) fail to contain a prohibition against suspension of rates for industrial resale, comparable to that in Section 4(e) of the Gas Act, but the rates here involved were not for such sales. PG&E's proposed rate was suspendible under Section 205(e), and the Commission, in setting PG&E's new schedule down for hearing, suspended it for the full five month period provided by that Section. In addition, although the new rate went into effect when the suspension period expired before the Commission completed its investigation, this was subject to Sierra's right, also provided in Section 205(e), to receive a refund of the excess, if any, over the reasonable rate as ultimately determined by the Commission. *Supra,* pp. 4-5. Thus, Sierra was protected all during the rate investigation from paying any rate other than a reasonable one, and although the Commission found, as a result of its hearing, that the new rate filed by PG&E was reasonable, Sierra was relieved under the statutory scheme from paying that increased rate during the period it was suspended. See *Hope Natural Gas Co. v. Federal Power Commission,* 196 F.2d 803 (C.A. 4).

By thus keeping the old rate in effect during the suspension period, the filed rate procedure operated, on the one

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hand, to benefit Sierra and on the other, to bur- // den PG&E with the loss suffered during the suspension period. In contrast, the result below would impose a far greater burden upon PG&E for under Section 206(a), which the court below held applicable (R. 480-2), the existing rate continues in effect until the Commission fixes a new rate "to be thereafter observed and in force," with no recourse against the purchaser should the Commission find as reasonable a rate higher than the existing rate. Indeed, the court below, by modifying its opinion, has imposed an even greater burden upon PG&E. By requiring the Commission to dismiss the case and to start anew under Section 206(a)—rather than permitting it to hold the Section 206(a) proceeding in the same case (the course sanctioned in its original opinion) (R. 482, 495)—the court below has in effect held that, even if the Commission in the new Section 206(a) proceeding should fix the rate at the increased level originally proposed by PG&E, PG&E is not entitled to any part of the increase not only for the period that the Section 206(a) proceeding will be before the Commission but also for the two year period that the Commission was erroneously, according to the court, considering the rate increase under Section 205(e). See *supra*, pp. 9-10, fn. 12.

II

The Commission's Determination That the Proposed Rate Filed by the Public Utility Was Reasonable Is Supported by Substantial Evidence

Sierra has indicated that if, contrary to the holding below, the Commission properly applied the filed rate pro-

cedure and directed the hearing held in the course // thereof to the reasonableness of the new rate,[19] it intends to urge that the judgment is sustainable on the further ground that "the Commission's finding that the proposed new rate was lawful in the light of the circumstances surrounding the negotiations of the contract was arbitrary, capricious and contrary to the evidence" (Resp. Br. in Answer in No. 51, pp. 3-4).

While, according to Sierra, the court below did not reach this question (*ibid*), we believe that a fair reading of the opinion below reveals an implicit recognition by the court that the proposed rate, which would yield PG&E a 4.75% return rather than the 5½% return to which it concededly is entitled (R. 21), was reasonable. The court entered its judgment despite this recognition because it thought that, inasmuch as "statutory reasonableness is * * * represented by an area rather than a pinpoint," (*Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251), the Commission in a proceeding under Section 206(a) might also find the contract rate to be reasonable (see R. 480-481). In these circumstances, since the finding of the new rate's reasonableness was upheld by the court below, there is no occasion for this Court to go into this additional

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[19] Section 205(e) is explicit in its provision that the hearing had by the Commission in following the filed rate procedure is directed to the reasonableness of the *new* rate. This, the court below fully recognized (R. 480):

> In modifying a filed rate under § 205, it is not necessary to prove that the original rate is unjust or unreasonable; the new rate will take effect if the utility sustains the burden of proving that it is "just and reasonable."

See, also, the similar recognition by the Third Circuit in *Mobile*, No. 31, R. 143.

issue which Sierra intends to raise. See // *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491.[20] On the assumption, however, that the Court might agree with Sierra's reading of the opinion below and might be willing to pass on this issue without the benefit of the further views of the court below, we turn to this question.

A. Applying Appropriate Standards for Fixing Rates, the Commission Properly Found that the Proposed Rate Will Provide No More than a Fair Return to the Public Utility from its Service to Sierra and Is Therefore Reasonable.

In passing on the reasonableness of the new rate proposed by PG&E—which both the court below (R. 480) and the

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[20] "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

Third Circuit in *Mobile* (No. 31, R. 143) recognized as proper where the filed rate procedure is applicable—the Commission utilized the cost of service test which it usually followed in rate proceedings under both Section 206(a) (the complaint-and-hearing procedure) and Section 205(e) (the filed rate procedure). The Commission found (R. 469):

> 8. The increased rate embodied in Supplement No. 1 to Rate Schedule FPC No. 3 has been satisfactorily shown to be such as to provide not more than a fair return on the portion of PG&E's net investment rate base properly allocable to that service after proper allowance for all operating expenses, as shown by Exhibit 19.

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Exhibit 19 (R. 295-298), upon which this finding is thus based, consists of a computation of PG&E's cost of serving Sierra upon the basis of operations during the test year 1952. Operating expenses and the investment rate base upon which a return is allowed (original cost less the accrued depreciation plus working capital) are allocated between the service to Sierra and to other customers in a manner consistent with applicable Commission precedents. The Exhibit incorporates changes proposed by the Commission's staff in the methods of computing cost of service and rate of return suggested by PG&E (R. 449, n. 5). The computation shows that the proposed rate would yield 4.75% as compared to the 2.60% return under the existing rate (R. 295). Since it was agreed by the parties that 5½% is a reasonable return for PG&E's electrical utility business on a net investment rate base (R. 21),[21] a comparison of this agreed reasonable return with the 4.75% return from the new rate leaves no doubt that, at least as far as Sierra is concerned, the Commission was justified in finding the new rate reasonable.[22]

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[21] It was also stipulated that a duly qualified Commission witness would testify that the method employed in Exhibit 19, which

While PG&E itself had proposed the new rate and no contention was made by Sierra that it was unreasonably low (indeed, Sierra seeks to keep it lower, see *infra,* p. 27*ff*),

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the Commission was careful to con- // sider the question of the deficiency in the rate of return which the new rate will produce. It found that the 4.75% return, although less than fully compensatory, was a reasonable rate of return for this particular part of PG&E's electric department's business because (1) PG&E had regarded that reduction from the 5½% rate of return as warranted to attract and retain this business and (2) "[w]ith the investment which PG&E has made and has undertaken to make in special facilities on which it would earn no return at all if it lost this particular business, it would require evidence of a kind not presented in this record to warrant a finding that the 4.75% rate of return it is willing to accept from this sale is unreasonably low" (R. 465). The Commission pointed out, however, that "no such considerations, on this record, warrant a conclusion that any rate substantially lower than that proposed would be reasonable." (R. 466). In the light of this need by PG&E to retain the Sierra business and its willingness to

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showed that the new rate would provide only 4.75%, was reasonable and proper (R. 63). Both stipulations were made without prejudice to Sierra's right to claim that the stipulated facts were "not relevant or material" (R. 21, 63).

[22] In contrast, the Commission noted that (R. 464) "if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful."

accept a less than fully compensatory rate, plus the fact that any deficiency would not be borne by other customers and that no undue discrimination or preference would result, the Commission concluded (R. 469):

> 9. No other facts have been shown affecting the justness and reasonableness of the proposed rate, and it is therefore not unjust or unreasonable.

The Commission also found that the new rate was not unduly discriminatory when compared with other PG&E rates (Fdgs. 10 and 11, R. 469-470) and accordingly concluded that the rate was not unlawful (Fdg. 12, R. 470).

Thus, the Commission made all of the determinations and used the criteria which were clearly appropriate and proper under well-established principles of utility rate regulation. The propriety of the use of such cost of service, based upon the prudent investment rate base, is well established. *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591; *Colorado Interstate Gas Co. v. Federal Power Commission,* 324 U.S. 581; *Panhandle Eastern Pipe Line Co. v. Federal Power Commission,* 324 U.S. 635; *Cities Service Gas Co. v. Federal Power Commission,* 155 F.2d 694 (C.A. 10), certiorari denied, 329 U.S. 773; *Safe Harbor Water Power Corp. v. Federal Power Commission,* 179 F.2d 179, 196-201 (C.A. 3), certiorari denied, 339 U.S. 957; *Pennsylvania Water & Power Co. v. Federal Power Commission,* 193 F.2d 230, 241-246 (C.A.D.C.), affirmed, 343 U.S. 414, 417. Also firmly settled is the propriety of so allocating costs as to assure that each portion of the utility's business bears its fair share of the overall cost of the utility's operations. *Colorado Interstate Gas Co. v. Federal Power Commission,* 324 U.S. 581, 586-595; *Northern Pacific Ry. v. North Dakota,* 236 U.S. 585, 594, 596-597; *Banton v. Belt Line Ry.,* 268 U.S. 413, 419-422. The Commission's refusal to disturb PG&E's managerial discretion in proposing a less than fully compensatory rate likewise accords with precedent. *Interstate Commerce Commission v. Chicago Great Western Ry.,* 209 U.S. 108, 118-119.

It is, of course, the function of the Commission "to reduce the abstract concept of reasonableness to concrete expression in dollars and cents." *Montana-Dakota Co. v. Public*

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Service Co., 341 U.S. 246, 251. // Since the proposed rate imposes upon Sierra no more than its fair share of providing a reasonable return to PG&E, the Commission's approval of the rate is fully justified. As the Court pointed out in *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591, 602, "It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." See also *Federal Power Commission v. Natural Gas Pipeline Co.,* 315 U.S. 575, 586.

B. The Commission Was Not Required to Depart from the Established Rate-Making Standards by Sierra's Claim of Special Circumstances Surrounding Negotiation of the 1948 Contract Rate.

As already indicated, Sierra does not claim that the proposed rates are unreasonably low, but rather that the rate should be even lower, *i.e.,* at the level provided in the 1948 contract. Sierra claims that the usual cost of service method of determining reasonablness of rates is irrelevant here, and that a different method should be followed because of the circumstances under which it entered into the 1948 contract with PG&E (R. 432, 450, Pet. Rev. 7, 9-10). According to Sierra, it entered into the 1948 contract in reliance upon the lower contract rates and thereby gave up the opportunity to obtain cheap power from other sources, notably from the United States Bureau of Reclamation; and it declares that PG&E offered the contract rate in order to retain Sierra's business, with the expectation that it would cover the incremental cost of the service, rather than yield any specific

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rate of re- // turn (R. 450-454; Pet. Rev. 7-10).[23] The Commission, however, disagreed with Sierra's version of the 1948 circumstances and, in any event, concluded that, even if that version were well founded, it would not constitute sufficient reason for departing from the cost of service test.

1. Existence of a Contract Does Not Alter the Test of Reasonableness. The very considerations which prompt legislatures to subject changes in contract rates to the same procedures as changes in other rates strongly support the application of the same set of standards for passing on these rate changes. As we pointed out in No. 31 (at pp. 26-27), the fact that an existing rate is fixed by private contract has little, if any, bearing on the reasonableness of the proposed change, or, for that matter, of the contract rate itself. For in agreeing upon the rate, the parties are motivated primarily by purely private considerations without regard to reasonableness as such, whereas the Commission con-

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[23] Sierra also contended that because the 1948 contract rate was negotiated under competitive conditions, it necessarily remained just and reasonable; that it would be unfair to change the rate in the 1948 contract while leaving all its other terms unaltered; and that its position was supported by rulings of the California Commission. See R. 450-452; *supra*, pp. 6-8.

siders the reasonableness of rates in light of an entirely different set of criteria, such as the relationship of the rate to, and its impact upon, the rest of the utility's rate structure. For this reason, not only are contract rates almost universally subject to change in the same manner as non-contract rates, but the same criteria have been utilized in passing upon proposed changes. Cf. *Duquesne Light Co. v.* *Public Service Commission,* // 273 Pa. 287, 294-295, 298.[24] While unvarying utilization of the cost of service test has been questioned, any proposed modification has been based on public utility principles and the nature of the regulated industry, not on the presence or absence of private rate contracts. See *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. at 601-605, 647-652. Similarly, while this Court has permitted non-compensatory rates on one portion of a utility's business, this also has been based upon special considerations in the public interest, not upon the existence *vel*

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[24] The court there noted that it was error "to restore to appellants the contract rates, without determining or even considering whether [the existing schedules] would yield to the two companies the fair return to which they were entitled * * *" (273 Pa. at 294-295), and then observed (273 Pa. at 298): "* * * if the contracts are to be held binding under all circumstances, as at one time appeared to be appellant's claim, then the statute but slightly changes the preexisting law, so far as concerns this matter, and the scandals growing out of favored terms being given to friends of the management, will be revived, although it was the intent of the Public Service Company Law to cut up by the roots all such possibilities. On the other hand, if the contracts, without other evidence, are to be so construed as to compel appellees to give to appellants a preferential rate by putting the latter in a class by themselves, as appears later to have been contended, not only are they thus given a great advantage over other large consumers (though the contracts themselves do not give it), but the foregoing objection will still remain, though slightly modified in form."

non of private agreements. *B. & O. R.R. Co. v. United States*, 345 U.S. 146, 148-150.

2. The facts, as found by the Commission, did not justify departure from the cost of service test. (a). The Commission found "unconvincing" Sierra's argument that it had contracted with PG&E and foregone other sources of supply in reliance upon continuance of the low contract rates (R. 451). Of course, Sierra could never have expected that

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the rates would con- // tinue during the contract term regardless of circumstances, since it has always conceded that the rate could be changed by order of the regulatory agency (R. 54, 145, 329, 458, Pet. Rev. 5-6). Moreover, even if Sierra's reasons for entering the contract were relevant (but see *supra*, pp. 28-29), the record supports the Commission's conclusion that in 1948 Sierra considered PG&E the only feasible source.

Sierra at that time sought a dependable source of power which would be available when the limit of the capacity of the existing transmission lines was reached in 1949 (R. 6-8, 32-33, 170-171, 199-200, 205-208, 231-232, 264) and PG&E was the only source which could be ready to supply it at that time (R. 15-16, 32, 203, 221, 264, 353). The one alternative seriously considered by Sierra was Shasta Dam power from the U. S. Bureau of Reclamation, which tendered a proposed contract.[25] However, the Bureau would not have completed its first transmission line before 1951 or 1952, and even this date was conditioned upon appropriations by Congress (R. 16, 32, 211, 222, 231, 347-348, 350, 353).

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[25] According to statements in the record, Sierra also considered obtaining the additional power from California Electric Company, Idaho Power Company, and through an expansion of its own power plants (R. 23, 205, 218). However, the record contains only a brief discussion of the possibilities of power from California Electric Company (R. 42-47), and Sierra's own development (R. 47-50, 217, 224), and there is no indication of any earnest exploration by Sierra of any of these alternatives.

Sierra's contemporaneous memoranda and statements indicate other objections, including that until 1956 the Bureau would provide only a single long transmission line which was unreliable because of the hazards of interruption (R. 209, 222-227, 351, 353-354); the Bureau service was en-

[31]

tirely contingent on Shasta's // water supply, with no diversified sources of power (R. 210, 223-224, 230, 351, 354); other arrangements for standby power would have been required (R. 222, 224, 229-230, 304, 347-348, 351, 353-354); and Sierra was not favorable to the expansion of public power (R. 173, 347). In general, Sierra officials contemporaneously characterized the Bureau's proposal as "highly speculative" (R. 234, 252), "premature and objectionable in many ways" (R. 355, 223), and believed that PG&E offered the "best and most dependable contract" (R. 206, 216) and the "best source of supply" available (R. 223, 209-210, 226, 351).

Sierra, it is true, did seek low contract rates from PG&E (R. 174-176). In January 1947, PG&E offered Sierra a 15-year contract at the then existing rates (R. 182-183) and only thereafter, in December 1947, agreed to the lower rates to be embodied in the 1948 contract (R. 340-342). However, it is evident that PG&E's rate was not the decisive factor leading Sierra to the contract since Sierra did not know, when it contracted with PG&E, how much the Bureau of Reclamation power would cost it. While the rate offered by the Bureau was .555 mills less than the PG&E rate (R. 33, 221), this Bureau rate did not include the necessary standby arrangement nor the cost to Sierra of the additional facilities for connecting transmission lines and stepping down [32] voltage (R. 39, 224, 229).[26] And for these reasons // Sierra's management realized at the time that it was not clear whether the cost of Bureau power would be more or less than PG&E power (R. 351, 355). Sierra's water resource engineer stated that they "didn't progress far enough" with the Bureau's proposal "to enter into those details" which would determine the actual cost to Sierra of Bureau power (R. 39). In 1948, when asked before the California Commission about possible additional charges by the Bureau for standby power, he testified, "It did not seem worth while trying to talk that over * * * because the balance of the contract did not seem to justify its acceptance." (R. 224.)[27]

(b). The Commission similarly rejected Sierra's effort to get the benefit of the 1948 contract rate through its argument that the criterion upon which it claims PG&E based its decision to execute that contract must be applied to test the reasonableness of any new rate. That criterion, according to Sierra, was the sufficiency of the rate to compensate PG&E for its incremental cost of serving Sierra, in addition to all other customers at the same level of service, rather than the average cost of service at that level.

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[26] Some idea of the probable cost of firming up the 90,000 kw which would be contracted for with the Bureau is afforded by the fact that Sierra paid $30,000 to PG&E to firm up 4,000 kw of power supplied from its own hydroelectric plants under the 1948 contract rate (R. 140-141). The cost to Sierra of special facilities under the Bureau transaction may be indicated by Sierra's anticipated expenditure of $750,000 for such special facilities when PG&E's first additional transmission line was constructed (R. 207).

[27] The contract offered by the Bureau is in the record (R. 309-24) and it manifestly contains numerous features troublesome to Sierra: the Colorado River Commission (the contracting party for resale to Sierra) would be required to give priority to public agencies and cooperatives (R. 313); the United States would be under no obligation to furnish power until its facilities were ready, as conclusively determined by the contracting officer (R. 321); there would be no obligation in case of the inadequacy of water to generate power (R. 322); and the contract and the liability of the United States would be contingent upon future congressional appropriations (R. 323). While it appeared to Sierra in February 1948 that, of the "numerous objections," "some * * * might be eliminated by negotiations" (R. 351), it is apparent that not all of them could be so eliminated.

In considering this contention, the Commission undertook an analysis of the situation as it existed in 1948 under the cost of service method, and ordered argument as to the future rate of return and future changes in capacity, sales, operating expenses and plant investment which were foreseen or reasonably foreseeable in 1948 (R. 438-39, 446-447). Exhibit 35 (R. 356-408) was accordingly prepared by PG&E, utilizing estimates of sales, costs and capital that had been actually made and used by PG&E in 1946 and 1947 (R. 81-88, 93-96, 101-3, 365-66, 372, 392-94). From these basic data, it was possible to compute the rate of return which was reasonably foreseeable when the 1948 contract was consummated (R. 88-89, 132, 361).[28] And, comparing the foreseeable return from PG&E's proposed new rate (for the period beginning in 1952) with the prospects of return from the contract rate foreseeable in 1948, the Commission concluded: "* * * there is no substantial difference between the rate of return which PG&E seeks by the present proposal, and that which was reasonably foreseeable at the time the 1948 contract was negotiated." (R. 453.)

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[28] In Exhibit 35, the reasonably foreseeable return is assumed to have been predicted in the third quarter of 1947, since from then on PG&E was committed to the contract rate (R. 392). The revenue and sales figures were actually used in a 1947 study, based on the then estimated demand (R. 365-6). Capital figures include an actual 1947 estimate of the cost of special facilities for Sierra and the units of investment in PG&E's system's network capital actually used in 1947, multiplied by Sierra's future demand as estimated in 1947 (R. 372). For unit costs, actual 1946 figures were the latest available when the contract was negotiated, but PG&E increased these by 10%. finding that such allowance might have been reasonably made in view of rising prices being then experienced (R. 384-5, 84-7). Since this 10% increase reduces the reasonably foreseeable return, it thus constitutes a concession by PG&E (R. 453, fn. 9).

Sierra objected to the Commission's concern with the rate of return reasonably foreseeable in 1948 under the ocntract, contending that this was purely hypothetical because no specific rate of return was actually foreseen by PG&E at that time (R. 453, Pet. Rev. 7). However, as the Commission's opinion pointed out, PG&E did have substantially equivalent information in 1948 from which to compute its rate of return.[29] In any case, the Commission found that there was no reason for it to depart from its customary practice of allocating the cost of PG&E's service among Sierra and other customers, even if PG&E had struck the 1948 bargain on its view of the "incremental" cost of maintaining service to Sierra (R. 454-55).

As pointed out above, *supra,* pp. 23-26, the reasonableness of a rate for a particular service can be tested by comparing the revenues that rate will produce with the utility's cost of rendering that service, allocating costs applicable to more than one service upon an average basis, and using a reasonable rate of return on the prudent investment to determine capital costs. In weighing Sierra's plea for special equitable treatment the Commission was only willing to go so far as to consider what the effect would be if the foreseeable rate

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[29] The cost of service study used by PG&E at the time the contract was negotiated set out the unit cost per kilowatt-hour of the company's integrated system and the additional cost of the special facilities for Sierra's service, such costs including a 6% return. (R. 113-6). This did not follow the method of Exhibit 19 (*supra,* p. 24); it did not allocate a portion of PG&E's rate base to the Sierra service and then calculate a percentage return to be yielded by the revenues from the proposed rates (R. 114). However, since a comparison of unit revenues with PG&E's unit cost figure would show the estimated deficiency from a 6% return (R. 114, 116), PG&E did have, as the Commission noted, "substantially equivalent information." (R. 453).

[35]

of // return from the contract rates when the contract was negotiated were to be deemed the continuing reasonable return from the service to Sierra, *i.e.,* its fair share of the burden of providing a reasonable return to PG&E's system (R. 452). That requirement was fulfilled since the new rate would do no more than restore the previously foreseeable rate of return.

3. Sierra seeks favored treatment. Examination of the record reveals that acceptance of Sierra's contentions would result in favored treatment for it. Besides Sierra, PG&E supplies power for resale to 13 other customers at rates lower than the proposed rate, most of these at rates equivalent to Sierra's 1948 contract rate (R. 411-12). Moreover, while Sierra's contract will extend at least to 1964,[30] all the other low rate resale contracts will expire by 1955, except that with the City of Alameda, which will expire in 1956 (R. 268-71, 283-4, 287, 411-3). PG&E's further resale contracts with 8 public utility corporations are at the rate which it has now proposed for Sierra (R. 412-13). In these circumstances, it is clear that in the near future all of the other low rate contracts will have expired, and Sierra alone, should its contentions be accepted, would be charged the low contract rate for an additional period of at least

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[30] The contract, by its terms, was to remain in effect until 1964 or 15 years from the date of entry into service of PG&E's additional line—or of a second line, if necessary—whichever is later. A second transmission has been found necessary and it is expected to go into service in 1956. Consequently, the contract will probably be operative until 1971.

eight years. Sierra, alone, would thus be relieved from paying its allocable share of PG&E's increased costs, costs which have increased substantially and unexpectedly since the contract was entered into in 1948 (R. 92, 282, 285, 358, 399).

While Sierra has sought to justify such favored treatment by reference to its version of the circumstnces surrounding the negotiation of the 1948 contract and its asserted reliance thereon, the simple fact is that all PG&E's customers, whether under contract or not, similarly rely, in purchasing power from PG&E and fixing their resale rates, on their assumptions of future costs of power, as well as on other cost and market factors. It would be unfair to allocate the burden of increased costs among PG&E's customers according to the existence of contracts and the order in which contracts expire. In utility regulation, benefits and losses are not fortuitous functions of varying dates and terms of contracts.

Sierra has sought support from a decision of the California Commission, the regulatory agency having jurisdiction over all the customers of PG&E, other than Sierra, who have been furnished power under low rate contracts (R. 280-3, 411-3, 456-7, 469). In 1951, PG&E applied to the California Commission for an increase in its contract rates to them: Sierra's rates were also included since, until *United States v. Public Utilities Commission of California,* 345 U.S. 295, it was not deemed clear by PG&E that the Power Commission had exclusive jurisdiction over the sale to Sierra.[31]

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[31] PG&E could not obtain a rate increase without such application under California law, which differs from the Power and Gas Acts and most state statutes and does not contain the usual filed rate procedure. See Commission's Brief in No. 31, pp. 68-69. California

[37]

The // California Commission acceded to the purchasers' pleas on the equities and refused to order higher rates but gave the parties an opportunity to renegotiate the contracts in the light of the higher basic resale schedule (equivalent to Sierra's proposed new rate in the instant case) which it then authorized (R. 280-91). Of course, the Federal Power Commission is not bound by the attitude of the California agency on the equities. Moreover, all the rates subject to the California Commission's jurisdiction are imminently subject to renegotiation because of the expiration dates of the contracts. Only Sierra's contract would remain outstanding, and it would last for 8 to 16 more years. Consequently, acceptance of Sierra's contentions, even taking into consideration the special treatment which the California Commission was willing to accord to the rate contracts subject to its jurisdiction, would have the result of permitting Sierra's low contract rate, alone of all the contract rates involved, to control for a substantial additional period.

Public Utilities Code, Sec. 454, provides: "No public utility shall raise any rate or so alter any classification, contract, practice, or rule as to result in any increase in any rate except upon a showing before the commission and a finding by the commission that such increase is justified." Section 455, the typical suspension and hearing section of the filed rate procedure, expressly does not apply to proposed increases in rates.

[38]

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Simon E. Sobeloff,
Solicitor General.

Warren E. Burger,
Assistant Attorney General.

Melvin Richter,
Lionel Kestenbaum,
Attorneys.

Willard W. Gatchell,
General Counsel,

Howard E. Wahrenbrock,
Assistant General Counsel,

William J. Grove,
Assistant General Counsel,

Drexel D. Journey,
Attorney,
Federal Power Commission.

September, 1955.

[No Number]

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 53

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner*

vs.

SIERRA PACIFIC POWER COMPANY

Brief for the Pacific Gas and Electric Company

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

[i]

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BRIEF FOR THE PACIFIC GAS AND ELECTRIC COMPANY

Opinions Below

The opinion of the Court of Appeals may be found in the Transcript of Record at pp. 478-482, and the Court's Order of March 23, 1955, amending its opinion may be found in the Transcript of Record at p. 495. (All references to the record herein will be made to the page number of the Transcript of Record.) The opinion of the Court of Appeals as amended is reported in 8 P.U.R. 3d 279. The Opinion of the Federal Power Commission is reported in 7 P.U.R. 3d 256, and may be found in the Transcript of Record at pp. 443-477.[1]

[2]

This is the companion case to *Federal Power Commission v. Sierra Pacific Power Company,* Case No. 51, now pending in this Court, and the Transcript of Record in that case is the same as in this case.

Jurisdiction

The Judgment of the Circuit Court of Appeals was entered on February 24, 1955, and thereafter amended on March 23, 1955. The Petition for Writ of Certiorari was filed on April 22, 1955, and was granted on May 23, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act (16 U.S.C. 825l).

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[1] The Opinion of the Circuit Court, the amendment thereto, and the Opinion of the Commission are also reprinted in Appendices A, B, and C, respectively, of Pacific Gas and Electric Company's Petition for a Writ of Certiorari previously filed in this proceeding.

Statute Involved

Pertinent provisions of the Federal Power Act, (49 Stat. 838; 16 U.S.C. 791a-825r), sometimes referred to herein as the "Act", are printed herein as Appendix.

Questions Presented

1. May a public utility initiate a rate increase under Section 205 of the Federal Power Act where the existing rate is specified in a contract?
2. Where the Federal Power Commission expressly found, upon a framed issue, that the contract-specified rate was unreasonable, could it authorize a rate increase with the same effect as though the proceeding had been initiated under Section 206(a) of the Act, which expressly requires such a finding, even though it was actually initiated under Section 205 which does not expressly require such a finding?
3. Assuming the Commission's order herein is deficient for lack of such a finding, should not the proceeding be [3] remanded with instructions to make a finding upon the issue, rather than be dismissed?

Statement

Since 1923 Pacific Gas and Electric Company (hereinafter called PG&E), a public utility, has supplied increasing amounts of electric power at Donner Summit in California to Sierra Pacific Power Company (hereinafter called Sierra), a public utility, for resale to Sierra's retail customers in California and Nevada. In 1948 PG&E entered into the third of a series of contracts which set out the terms and conditions under which these power deliveries were made. This contract also specified the rate and, like the contract which it superseded, was filed with the Federal Power Commission (hereinafter called Commission), which designated it as PG&E's Rate Schedule F.P.C. No. 3 (R. 138-146) and fixed its effective date as of January 1, 1948. In light of *U. S. v. Public Utilities Commission,* 345 U.S. 295 (1953), the jurisdiction of the Commission over all sales under the 1948 contract is clear and the Commission so found (R. 468).

The 1948 contract by its terms would extend 15 years after the operative date of the second of two 110,000 volt transmission lines to be constructed to serve Sierra's growing load. The evidence indicated that the terminal date was estimated as 1971.

On February 2, 1953, in order to meet a very substantial increase in its costs of serving Sierra, PG&E initiated the present proceeding by filing with the Commission a proposed increase in the Sierra rate, designated Supplement No. 1 to Schedule F.P.C. No. 3 (R. 428), together with supporting data as required by the Commission's rules (18 C.F.R. 35.3).

[4]

The Commission thereupon invited the Public Utility Commission of California, the Public Service Commission of Nevada, and Sierra to comment upon the proposed increase. The California Commission made no comment. Both the Nevada Commission and Sierra protested and requested a hearing. Sierra claimed that the proposed new rates were unjust and unreasonable because the 1948 contract-specified rates had been designed to meet a competitive situation and because, in any event, its contract rights could not be changed under Section 205 of the Federal Power Act, but only under Section 206(a) of the Act upon a finding that the 1948 rates were unlawful (R. 445).

On March 13, 1953, the Commission ordered a hearing concerning the lawfulness of the proposed rate increase and ordered the rate suspended for five months following the proposed effective date of April 6, 1953 (R. 431-434), after finding that the proposed rate might be "unjust, unreasonable, unduly discriminatory or prejudicial" (R. 433), and that it was "necessary, desirable, and in the public interest" (R. 433) to hold such hearing. Sierra petitioned for leave to intervene which was granted, and also to have the filing rejected. The Commission denied the latter request without prejudice to Sierra's right to thereafter maintain its contentions (R. 445-446).

The Commission held 10 days of hearings during which both Sierra and PG&E presented evidence. In briefs filed at the conclusion of the hearings PG&E requested a finding, among others, that the 1948 contract-specified rate was unreasonable and Sierra requested a contrary finding.

The statutory maximum period for suspension of the proposed rate increase expired on September 6, 1953, and PG&E was authorized to place the increase in effect subject

[5]

to refund of any portion thereof not found justified (R. 440-442).

By order issued September 21, 1953, the Commission ordered further argument on six questions directed to actual costs, revenue and rate of return under the 1948 contract-specified rate, as compared with results foreseen or reasonably foreseeable at the time the contract was made. The Commission held further hearings on two days in March, 1954, to receive further evidence with respect to these questions. Oral argument followed and on June 17, 1954, the Commission issued its opinion and findings (R. 443-470) with two dissents (R. 471-477).

The Commission found that the proposed rate was not unjust, unreasonable, unduly discriminatory or preferential (R. 469-470). It determined that the proposed rate would not provide more than PG&E's cost of rendering service to Sierra (R. 448), noting that the evidence showed the proposed rate would yield PG&E a return of 4.75% on a net investment rate basis (R. 449), while 5½% would be a reasonable rate of return for its electric operations as a whole (R. 448).[2]

The Commission rejected Sierra's contention that because the 1948 contract-specified rate was negotiated under competitive conditions it necessarily remained just and reasonable (R. 450-451). It determined that Sierra had not foregone other sources of electric supply in reliance upon the continuance of all terms of the 1948 agreement, the evidence clearly indicating that in 1948 Sierra regarded other sources of supply as unacceptable (R. 451). No unfairness was found in changing the rates while all other terms of the

[6]

contract were // left in force because Sierra could not suggest any changes it would desire (R. 451). An extensive examination was made of the foreseeable rate of return to PG&E under the 1948 agreement, and the Commission determined that due to the increased cost of serving Sierra the proposed new rate would merely restore to PG&E the rate of return reasonably foreseen and foreseeable in 1948, and no more (R. 452-455).

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[2] Sierra did not contest the showing of a 4.75% return and stipulated to the reasonableness of a 5½% return for PG&E's electric operations as a whole, without conceding its materiality. (R. 21).

Turning to Sierra's contention that Section 206(a) rather than Section 205 of the Federal Power Act governed the proceeding here, the Commission, after serious and extensive consideration, rejected it as not being in accord with the law or the Commission's long-standing construction of Section 205 of the Act (R. 457-464). However, the Commission pointed out that "If a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful" (R. 464), that "none of the evidence in this record warrants a finding that any rate would be reasonable that would produce a return of substantially less than the 4.75% resulting from the proposed rate" (R. 464), and that "no such considerations [as raised by Sierra] on this record warrant a conclusion that any rate substantially lower than that proposed would be reasonable, and hence we would have to conclude that the 1948 contract rate is now unreasonable and unlawful" (R. 466). The Commission expressly made its opinion a part of its findings by incorporation and reference (R. 466).

Sierra's petition for rehearing was denied and its petitioned the Court of Appeals for the District of Columbia Circuit for review. The Court of Appeals, in a decision rendered February 24, 1955, (R. 478-482) directed that the Commission's order be set aside on the sole ground that

[7]

the contract-specified rate could not be increased except by a proceeding under Section 206(a) of the Act in which a finding was made that the contract-specified rate was unlawful.

The Court originally directed that the case be remanded for dismissal or for further proceedings under Section 206(a) of the Act. However, on March 23, 1955, in response to a motion by Sierra, the Court modified its order and directed the Commission to dismiss the proceeding, but without prejudice to the initiation of a new proceeding under Section 206(a) (R. 495). Thus, PG&E was to be denied any consideration of the merits of its case in the instant proceeding.

Summary of Argument

In 1953 PG&E was supplying power to Sierra under a contract executed five years before, when its costs were far lower. To initiate a rate increase proceeding, PG&E filed a proposed increased rate under Section 205(d) of the Act. The Commission held hearings, considered and decided all possible issues and finally allowed the increased rate to stand effective.

I.

The initiation of the proceeding under Section 205(d) was proper because it complied with the express language of that section, which makes no distinction between contract-specified rates and other rates. Interpretation of Section 205 to authorize use of the filed rate procedure with respect to contract-specified rates follows the rule generally adopted in other jurisdictions with similar statutes.

The Section 206(a) procedure, which the court below thought should have been followed, was not intended for rate proceedings initiated by the utility. This section authorizes action upon the initiative of the Commission or upon complaint and does not authorize a utility to complain against its own rates.

The use of the Section 205 procedure does not "abrogate" contracts as the court below thought. It is conceded that contracts for public utility service are subject to regulation and the only possible question here is the choice of the procedure under which such regulation is to be effected.

In any event, either procedure would give the same end result: the just and reasonable rate for the service rendered. Hence, there is no reason to depart from the express language of Section 205(d) of the Act authorizing a contract to be changed by a process initiated by the filing of a new schedule. The court below thought it was significant that the Section 206(a) procedure would have required a separate finding that the old rate was unreasonable before any change could be made. However, a finding under the Section 205 procedure that the new proposed rate is reasonable makes it unnecessary to find that the old rate was unreasonable. If the Commission finds a rate to be reasonable a materially different rate is necessarily unreasonable. When the court below stated that there is a statutory area within which rates may be reasonable, it confused the function of judicial review, which permits the Commission to operate within an area, with the function of Commission rate determination, which reduces the statutory standard to a precise dollars and cents evaluation.

The Commission would be severely handicapped if it had to accept any rate within an area as reasonable. This court should reject the views of the court below and reaffirm its prior determinations that Congress gave the Commission the power under both Section 205 and Section 206(a) to determine the particular rate which is just and reasonable for the service being rendered.

[9]

The fact that the proposed rate increase under Section 205(e) may go into effect after a five months' suspension period does not burden Sierra. The increase is subject to refund at the conclusion of the hearing to the extent that it is found not justified. The result is only that Sierra pays no more and no less than the rate which the Commission ultimately determines to be reasonable. This is an equitable device for minimizing the hardships of delay in regulatory proceedings and is applicable to contract-specified rates just as clearly as to any other rate.

II.

In this case, it should be immaterial whether the proceeding was properly initiated. The only feature of the Section 206(a) proceeding which the court below found absent in the present proceeding was a finding that the old contract-specified rate was unreasonable. It did recognize that the Commission declared that, if such a finding were necessary, the finding would have to be that the old rate was unreasonably low and, therefore, unlawful. The Commission expressly incorporated all of its opinion, including this statement, in its findings. There is no formal defect in the way in which the finding was made.

The court below, however, disregarded the Commission's statement because it was made in a proceeding in which the court thought the unreasonableness of the old contract-specified rate was not an issue. In this, the court clearly erred because Sierra raised the issue at the outset, evidence was taken thereon, findings were requested thereon and the Commission considered it in detail and expressly disposed of it. Substantively, nothing more could have been necessary to dispose of the issue, and, procedurely, there is no reason whatever to require anything more.

III.

If anything more was required to dispose of this case, the court below should have remanded the matter with instructions to the Commission to make a further finding so that neither party would be prejudiced by the Commission's failure to follow what the court deemed to be the correct procedure. A dismissal by the court at this point amounts to a determination of PG&E's rate for a period of over two years, a determination which should be made only by the Commission in its expert capacity.

IV.

The Commission's findings are fully supported by the evidence and there is no occasion for a court to substitute its own determination as to the facts.

Argument

I. This Rate Increase Proceeding Was Lawfully Initiated by PG&E's filing of the proposed increased rate schedule.

Did P.G.&E. correctly initiate this rate increase proceeding by filing its proposed rate in accordance with Section 205(d)? The Court of Appeals decided, by implication[3], that it did not and that this error nullified the entire proceeding.

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[3] Actually the court below nowhere states that the filing by PG&E under Section 205(d) was not authorized. The court's opinion deals solely with the proposition that a contract-specified rate can be changed only if the finding required by Section 206(a) is made. The court's dismissal of the proceeding arguably has left the filed increase in effect, since the "dismissal" ordered by the court would seem to be equivalent to the "termination" ordered by the Commission (which expressly left the filed increase in effect).

PG&E is a "public utility" as defined in Part 2 of the Federal Power Act and many phases of its business are subject to regulation by the Federal Power Commission under the various provisions of that Act. In particular, Section 205 sets forth (1) the standards which it must observe in fixing rates for interstate sales of power at wholesale, such as sales to Sierra, (2) the manner in which such rates shall be established initially and thereafter changed by the utility and (3) the authority of the Commission to suspend, hold hearings on and set aside any such change. Section 206(a) gives the Commission authority to review existing rates at any time either on its own initiative or on complaint.

Although Section 205 expressly applies to contracts, as well as rates, Sierra contends that PG&E could not initiate a change in its 1948 contract-specified rate for service to Sierra by filing a proposed higher schedule under Section 205(d). This contention is contrary to the Act for the reasons which follow.

Nevertheless, it seems advisable for us to assume in arguing this point, that the court below intended to nullify PG&E's filed rate increase. Point II, infra p. 30, shows that the finding which the court below required was actually made in clear and express terms after full consideration.

A. The Language of the Act Contemplates That All Utility-Initiated Rate Proceedings Shall Be Brought Under Section 205.

1. Section 205 of the Act Expressly Authorizes a Public Utility to Initiate a Change in Any Rate, Including a Contract-Specified Rate, Through the Rate Filing Procedure.

In express terms, Section 205 deals with rates in all their aspects including standards, classifications, practices, regulations and contracts affecting or relating to rates.

Under Section 205(a) of the Act all rates and charges of a public utility for electric service must be "just and reasonable". Under Section 205(c) of the Act every public utility "shall file with the Commission * * * and shall keep open in convenient form and place for public inspection schedules showing all rates and charges * * * together with all con- [12] tracts which in any manner affect or relate to such rates, charges, classifications and services." This court has already decided that a contract-specified rate becomes effective not by virtue of the contract, but by virtue of the filing under Section 205(c). *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246, 251 (1951).

Since the filing of a contract has this effect, it is not surprising to find that Section 205(d) provides that a change in a contract-specified rate may be initiated by filing a new "schedule":

> "Unless the Commission otherwise orders, no change shall be made *by any public utility* in *any* such *rate,* charge, * * * *or contract relating thereto,* except after 30 days notice to the Commission and to the public. Such notice shall be given by filing with the Commission

> and keeping open for public inspection new *schedules* * * *" Section 205(d). [Emphasis added.]

If this wording is effective to permit ordinary rates to be changed through the filing procedure, as all admit, it must be equally effective to permit a contract-specified rate to be changed through the same procedure. This "filed rate" procedure has been widely adopted and in the great majority of jurisdictions is an accepted method for changing contract-specified rates. This subject is fully dealt with in the brief for the Federal Power Commission in *Federal Power Commission v. Mobile Gas Service Corporation,* No. 31, now before this court and we refer to Point II of that brief for a complete citation of authorities.

Congress did not, of course, leave public utilities free to change their rates at will. By Section 205 (a) and (b) the utilities must demand only just, reasonable and non-discriminatory rates. The statutory waiting period required by Section 205(d) before a filing can take effect is imposed

[13]

so that the Commission can examine the proposed rate and give opportunity for others to protest as Sierra did in the instant proceeding. The Commission vigilantly carries out its duty of review. By its rules it has enlarged the waiting period to 60 days where an increase in rates is proposed and requires a detailed showing in support thereof.[4]

The necessary power to make such review effective was given in Section 205(e) which authorizes the Commission "either upon complaint or upon its own initiative * * * to enter upon a hearing concerning the lawfulness of such [new] rate, * * * suspend * * * such schedule * * * 5 months,

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[4] 18 C.F.R. 35.3(c).

* * * and after full hearing * * * make such orders with reference thereto as would be proper in a proceeding initiated after it [the new rate] has become effective." The latter phrase means that the Commission is not restricted to consideration of a utility's filed proposal but may fix whatever it determines to be the just and reasonable rate. The burden of proof to establish the reasonableness of any proposed increase is placed squarely on the public utility. If the Commission does not determine the matter before the end of the five months suspension period, the rate may go into effect, but the utility must refund with interest any portion thereof found not justified.

Thus, Section 205 provides a comprehensive scheme which sets forth the standards for public utility rates and the method by which such rates are to be filed and changed, subject to Commission control.

This Court has already recognized, in *Pennsylvania Water and Power Co. v. Federal Power Commission,* 343 U.S. 414, 423, 424 (1951), that a utility may institute proceedings for the modification of a contract under Section 205 of the Act, where it said:

[14]

> "If Pennsylvania Water wishes to discontinue some or all of the services it has rendered for the past 20 years, the Act, as the Commission pointed out, opens up a way provided Pennsylvania Water can prove that its wishes are consistent with the public interest. Shortly after P. II of the Power Act was passed in 1935, Pennsylvania Water, as required by Section 205(c), filed with the Commission the *contract* here attacked and then designated by the Commission as 'Pennsylvania Water's Federal Power Commission Rate Schedule No. 1'. Section 205(d) provides that 'no change shall be made by any public utility in any such * * * service

> * * * or contract relating thereto except after thirty days' notice to the Commission and the public'. Here instead of following the procedure for changing existing services and practices—a procedure which the Congress has authorized and which the Commission has supplemented by rules of its own—the Company has rather tried to utilize a violation of the Sherman Act so as to nullify a rate reduction order." [Emphasis added.]

The foregoing conclusion is amply supported by the consistent interpretation of the Act by the Commission which is charged with carrying out the purposes of the Act. Such interpretation should be followed so long as it is reasonable.[5] The Commission's interpretations are fully described in the brief for the Commission in the *Mobile* Case No. 31 above referred to, particularly Subdivision B of Point I.

2. Section 206(a) of the Act Does Not Authorize a Public Utility to Initiate a Rate Proceeding.

If, as we have shown, Section 205 of the Act is a complete statement of the duty of public utilities with respect to rates

and provides the authority for review of the utilities' rate changing acts, then Section 206(a) falls naturally into place as a grant of authority to the Commission to exercise rate fixing powers, on its own initiative or on complaint, whenever the utility fails to act. The pertinent wording of Section 206(a) is as follows:

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[5] *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 130, 131 (1943). See also *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate * * * charged * * * by any public utility * * * or that any * * * contract affecting such rate * * * is unjust [or] unreasonable * * * the Commission shall determine the just and reasonable rate * * * or contract to be thereafter observed and in force, and shall fix the same by order."

This wording is not appropriate to authorize initiation of a rate proceeding by a public utility since "upon complaint" would not normally signify action by the public utility attacking its own rate. Where the public utility desires an increase in a contract-specified rate, it seems far more rational from a procedural standpoint[6] to require it to propose and bear the burden of proving the reasonableness of a substitute rate under Section 205(d) and (e) than merely to file a complaint about its existing rate under Section 206(a) and prove that rate unreasonable.

That the Congressional view of the meaning of "complaint" is the same as ours is clearly shown by Section 306 of the Act, relating to complaints generally, which provides that "any person, state, municipality, or State commission" may complain to the Commission "of anything done, omitted to be done, by any licensee or public utility in contravention of the provisions of this Act." Such language certainly does not contemplate complaint by a public utility against itself.

[16]

The conclusion is inescapable that the instant proceeding was properly initiated under Section 205(d). To reach the opposite result, it would be necessary to read an exception for contract-specified rates into Section 205(d) in the face of express language to the contrary and to read Section 206(a) as authorizing a utility to complain about its own rate. There are no considerations which require such rewriting of straightforward language.

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[6] We deal with the substantive aspects under the next heading.

B. There Is No Substantive Reason Why the Statutory Language Should Not Be Literally Applied.

1. The Choice Does Not Lie Between a Procedure Which Abrogates Contracts and a Procedure Which Does Not.

The court below felt it necessary to strain the statutory language because, adopting Sierra's position, it thought that:

> "The novel and important question for decision is whether and to what extent the pre-existing right of utilities to enter into enforceable rate contracts has been abrogated by the Commission's power under the Act to regulate rates."

This raises a false issue. All contracts for public utility service are subject to the exercise of the legislative power of regulation.[7] The possibility of change by regulatory powers does not nullify or abrogate such contracts. We are concerned here to determine how the Act specifies that contracts shall be changed, not whether they shall be changed. All this is, of course, conceded by Sierra and assumed by the court below.

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[7] "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." *Munn v. People of Illinois,* 94 U.S. 113 at 134 (1876).

They insist, however, that to apply the "filed rate" process of the Act to contracts is to abrogate or nullify all rate contracts subject to the Act. Clearly, this does not follow. The possibility of change is inherent in all public utility service contracts. That the change may be initiated by a rate filing by one of the parties (or, indeed, by a complaint by the other) does not nullify the contract. The "filed rate" procedure is well recognized[8] and where it is prescribed any public utility service contracts which specify rates must imply the use of that procedure.[9]

These considerations also dispose of the court's adoption of a restrictive rule of interpretation because the taking away of a "common law right" was involved. No one has a right to a particular mode of regulation[10] and the contract here in question was entered into 12 years after the filed rate procedure of the Power Act was adopted.

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[8] This is fully covered in the Commission's brief in the *Mobile* case, No. 31. See its Point II C.

[9] See e.g., *Suburban Water Co. v. Borough of Oakmont*, 268 Pa. 243, 110A. 778, 781 (1920), where the Pennsylvania Supreme Court said in holding that a filed rate may supersede a contract rate: ''All public service contracts are viewed in the light of having been made with an implied provision that the rate named therein is subject to change, according to law, so as to keep it reasonable and nondiscriminatory at all times.''

[10] See *Munn v. People of Illinois*, 94 U.S. 113 at 134 (1876), note 7.

2. The End Result, the Just and Reasonable Rate, Must Be the Same Under Either Procedure.

Whether the rate increase proceeding is initiated under Section 205(d) or under Section 206(a) the end result is the same: determination of the just and reasonable rate for the service rendered. In the event of a failure of proof under

either procedure, the contract-specified rate will remain in effect.

The differences in approach under the two procedures appropriately reflect the fact that Sections 205(d) and (e) are intended for the situation where the utility has a specific substitute rate to offer, whereas Section 206(a) is intended for the situation where the Commission or another person desires a change in an established rate.

Under Section 205(d) and the Commission's rules thereunder (18 C.F.R. 35.3(c)) the utility's proposed increased rate must be justified in the first instance by what might be called a *prima facie* showing. If this showing fails to satisfy the Commission or if a protest is received the next step is a hearing under Section 205(e) in which the utility has the statutory burden of proving that the increased rate is just and reasonable. If it fails to meet this burden, the old rate will remain in effect unless the Commission is satisfied by evidence that some other rate is the just and reasonable rate,[11] in which case the Commission may make such other rate effective.

Under Section 206(a), inquiry is directed to whether the existing rate charged by the utility is just and reasonable and, if not, the Commission must determine and fix the just and reasonable rate.

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[11] See *Central Illinois Pub. Service Co. v. Illinois Commerce Commission,* 125 N.E. 2d 269 (Ill. Supr. Ct., 1955).

There is no doubt that the Commission's powers under Section 205(e) are as great as under Section 206(a), for the former section provides that 'after full hearings * * * the Commission may make such orders with reference [to the rate] as would be proper in a proceeding initiated after it had become effective," i.e. as would be proper in a Section 206(a) proceeding.

Since the end result must be the same under either procedure, there is no reason to strain the statutory language in favor of one procedure because of a fear that an undesirable result would follow under the other procedure. Yet, just such a misapprehension was clearly a major factor in the decision of the court below.

The Court of Appeals thought that the result would be different because under Section 205(e) the Commission would first determine whether the *proposed* rate was reasonable, whereas under Section 206(a) the Commission would first determine whether the *existing* rate was reasonable. The court thought that *both* rates might be reasonable and therefore the result could depend upon which rate was examined first.

This is a surprising misunderstanding of the Commission's functions and duty in rate cases. True, as the court says, *statutory* reasonableness is an area, rather than a pinpoint, but this means that a *court* might have to accept either rate if the Commission found it reasonable. It is the Commission's duty, however, to pinpoint the reasonable rate. As this court said in the very case relied upon below: "To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission."[12]

Judges determine the outer boundaries of the statutory area of reasonableness, but the Commission, as an expert body, makes a precise evaluation of the various elements of reasonableness. It does not choose a rate at random within the area. It weighs the various factors, which may include the circumstances of the contract, as in the instant case, and concludes for itself what is the reasonable rate. This

is clearly what Congress intended it to do, for in Section 206(a) it directs the Commission to "determine *the* just and reasonable rate * * * to be thereafter observed and in force."[13] This negatives any idea that more than one rate could be reasonable at any given time for given conditions of service.

The difference between the two procedures, then, is merely procedural. The job of the Commission is the same in either case: to arrive at the just and reasonable rate. Under Section 205(e) the Commission goes directly to the issue of reasonableness of the substitute rate offered by the utility, and if it is not satisfied it may then determine for itself the reasonable rate to be charged. Under Section 206(a) the commission determines whether any change in rate is required and, if so, determines the reasonable rate to be charged.

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[12] *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, at 251 (1951).

[13] Emphasis supplied. As we have previously pointed out (p. 18) the Commission's powers under Section 206(a) are incorporated in Section 205(e).

Under either procedure, it is clear that all evidence relevant to determining the rate for the service in question will be admissible and entitled to consideration. Cost of service with its various elements such as operating expense, depreciation, rate base and rate of return is usually a major consideration, but other factors such as value of service, history of the rate, and other special circumstances may be relevant and if so will be considered by the Commission.

In the case at bar, for instance, in passing upon the reasonableness of the *proposed* rate, the Commission expressly considered not only the cost of service, which P.G.&E. contended should be the determining factor, but also the circumstances under which the contract-specified rate was established, which Sierra contended should be the determining factor. In finding that the proposed rate was cost-justi-

[21]

fied and that Sierra's position on the contract circumstances was not in accord with the evidence, the Commission necessarily disposed of all issues relating to determination of the reasonable rate for service to Sierra. Sierra did not at the hearing, nor has it subsequently, suggested that it had any further evidence to offer.

Attention is directed to the fact that the Commission's determination of these issues was made in passing on the reasonableness of the *proposed* rate, before it passed to the question of whether it should make a finding, as requested by Sierra, on the reasonableness of the *existing* rate. This is important because it shows that in actual practice a hearing under Section 205(e) will encompass all issues which are relevant to determination of the reasonable rate. If the existing rate is relevant, it must be considered under the substantive provisions of Section 205(e) as well as under Section 206(a).[14]

We submit, then, that no consideration of substance require the use of Section 206(a) rather than Sections 205(d) and (e) to change a contract-specified rate.

C. The Interpretation of the Court Below Is Based Upon an Erroneous View of the Commission's Rate Making Authority Which Would Impair Its Effectiveness.

The court below believed that the Commission under either procedure would merely review a rate[15] and, if it found that the rate in question lay within the statutory area of reasonableness, it would proceed no farther. As we have shown, this confuses the Commission's function with the function of a court upon review, with serious consequences upon the Commission's powers in rate cases.

Basically, this would mean that there is a statutory area within which the Commission has no power to fix rates. If, by contract, the utility and its consumers agree upon a rate, whether in the upper or lower range of the area, the Commission would not be able to act. Furthermore, in the absence of a contract, the utility would always be free to increase its rates to the upper limits of the area.

There is no ground for believing that Congress intended such a result. The statutory area is the entire area within which the Commission may exercise its expert judgment free of judicial interference. As Mr. Justice Reed said of the requirement of the Natural Gas Act that rates be just and reasonable:

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[14] Undoubtedly, the assumption to the contrary by the Third Circuit Court of Appeals influenced its decision in the *Mobile* case (see infra. p. 27).

[15] Under Section 205(e) the proposed rate; under Section 206(a) the existing rate.

> "When the phrase was used by Congress to describe allowable rates, *it had relation to something ascertainable.* The rates were not left to the whim of the Commission. The rates fixed would produce an annual return and that annual return was to be compared with a theoretical just and reasonable return, all risks considered, on the fair value of the property used and useful in the public service at the time of the determination.
>
> Such an abstract test is not precise. The agency charged with its determination has a wide range before it could properly be said by a court that the agency had disregarded statutory standards or had confiscated the property of the utility for public use. C.f. Chicago, M. & St. P. R. Co. v. Minnesota, 134 US 418, 461, 466, 33 L ed 970, 983, 984, 10 S Ct 462, 702, 3 Inters Com Rep 209, dissent. This is as Congress intends. Rates are left to an experienced agency particularly competent by training to appraise the amount required." (Emphasis supplied.)
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> *Federal Power Commission v. Hope Natural Gas Co.*, 320 US 591, 621 (1944), dissenting opinion.

[23]

Passing over the fair value rate base, not involved here, it is submitted that this is an accurate characterization of the Commission's powers and duties. The view of the court below, however, would cut off the exercise of the Commission's special competence at the outer edge of the statutory area—the very point at which it should take over. There is no justification for such a conclusion. Under either Section 205(e) or Section 206(a) the Commission does not sit to review rate fixing activities of others; it sits to exercise its power to determine the just and reasonable rate.

An interpretation of the Act, such as that below, which is based on any more limited view of the Commission's functions and power must be rejected.

D. The Use of Section 205(e) Gives Both Parties the Benefit of the Equitable Collection and Refund Procedure.

It is well-known that one of the serious problems in rate regulation is the result of delays in the rate-making process. during the course of a proceeding, the utility may be compelled to furnish service for a rate which is less than that ultimately determined to be reasonable, or, conversely, its customers may be compelled to pay a rate which is higher than that ultimately determined to be reasonable.

In Section 205(e), Congress prescribes a procedure to mitigate the effect of delay where a public utility proposes a change in rates. The Commission is authorized to suspend a proposed change for a period not to exceed five months. At the expiration of that time, the change may be placed in effect, but if the utility has proposed an increase, it must at the conclusion of the proceeding refund to its customers any increase above that which the Commission finds not justified. Thus, after an initial period in which the utility may be deprived of any benefit from a proposed increase, even though subsequently proved reasonable, the rates

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actually charged are subject to adjustment so that the cost to the customer and the revenue to the utility coincide with the ultimate determination of the Commission as to reasonableness. Consequently, allowing the utility to place a rate increase in effect after the five months suspension period is fair to both parties.

There is no reason why this procedure should not be applied to proposed changes in contract-specified rates as well as to any other rates. In fact, if there were any doubt as to the application of Section 205(e) to contract-specified rates, we submit that this Court should adopt the interpretation which permits the use of this equitable procedure.

Section 4(e) of the Natural Gas Act presents a different problem because of the prohibition against suspension of a rate for gas which is resold for industrial use only, the situation involved in the *Mobile* case. For such sales, Congress provided that the utility should be entitled to collect the increase while the rate case was pending. Thus, the utility may be entitled to retain some charges collected in excess of those ultimately found to be reasonable. Under the rule of the Third Circuit in *Mobile* this would not be allowed where the rate was contract-specified. That result, however, was no more equitable than the one which the Commission reached, for the customer might well enjoy service during pendency of the proceeding at a rate less than that ultimately found to be reasonable.

It is seen that three possible methods of dealing with the problem of delay in rate increase proceedings have been adopted by Congress. (1) In Section 205(e) of the Power Act and in the general case under Section 4(e) of the Gas Act, Congress has required the utility to bear the burden of delay for a five-months period, but thereafter permits a rate which is ultimately adjusted to that which is just

and reasonable for the service rendered. (2) Under the proviso of Section 4(e) of the Gas Act, the purchaser for resale for industrial use must bear the burden until the case is determined. (3) Under Section 206(a) of the Power Act and Section 5(a) of the Gas Act where a rate increase is involved the utility must bear the burden of delay.

There is no reason to suppose that in setting up these different methods, Congress intended the existence of a contract to have any effect on their application. Certainly, there should be no quarrel with the use of the Section 205(e) procedure in the case at bar. PG&E was compelled to forego any increase for a period of five months. After that period, the cost to Sierra and the amount ultimately retained by PG&E could not exceed the just and reasonable rate for the service rendered. Furthermore, if it had been found that PG&E had collected any more than the just and reasonable rate, it would have been required to pay Sierra 6% interest on the excess amount.

Clearly, then, the collection and refund procedure of Section 205(e) is just as fair and equitable to the contract customer as to any other customer and should be applied equally to both. It cannot be emphasized too strongly that under Section 205(e) neither a contract-specified rate or any other rate can be effectively increased except to a rate which is found by the Commission to be just and reasonable.

E. The Mobile and Wichita Cases Do Not Support the Holding of the Court Below.

The court below relied primarily upon *Mobile Gas Service Corporation v. Federal Power Commission,* 215 F.2d 883 (1954) which, as we have mentioned before, is now before this court on writs of certiorari to the Third Circuit Court of Appeals (Cases No. 31 and 17). The opinion of the Third

Circuit in turn relies principally upon *Wichita R.R. & Light Company v. Public Utilities Commission,* 260 US 48 (1922).

1. The Court Below Erred in Relying on Mobile.

The basic errors of the *Mobile* decision are substantially the same as those of the court below in the instant case which we point out in the foregoing portion of this brief. These errors are analyzed and ably discussed in the brief for the Federal Power Commission before this court in *Mobile* (No. 31) and we need not repeat what is there said.

However, even should this Court sustain the Third Circuit in *Mobile,* it would not be controlling on the issue of interpretation because the decision in that case was strongly influenced by the limitation on the suspension provisions of Section 4(e) of the Natural Gas Act involved in that case, unlike Section 205(e) of the Federal Power Act.

Under Section 4(e) suspension of rates for gas to be resold for industrial use, the type of sale involved in *Mobile,* is prohibited. There is no comparable limitation on the Commission's powers of suspension under Section 205(e). While the court below asserted that this distinction was in no way determinative, and did not express an opinion as to whether or not it should have been, it seems clear that such consideration was in fact of great importance to the majority in *Mobile* for, in distinguishing the case of *Tyler Gas Service Co. v. United Pipeline Co.,* D.C. Tex., December 23, 1953 (affirmed 217 F.2d 73 (5th Circ. 1954)), the Court said:

> "It should be emphasized also that the fact that *Tyler* concerned a rate for sale of gas for domestic use of itself *sets that action apart from the issue of this appeal.* In *Tyler* under Section 4(e) the Commission

> could and did suspend the effective dates of the increased rate for 5 months, after which period it could order any subsequent collections to be subject to refund
>
>
>
> in the event the new rates were ultimately found to be unlawful." (Emphasis added).[16]

Thus, the circuit court did not purport to express an opinion on the situation where, as here, suspension was possible and in fact ordered by the Commission. By so carefully pointing out this distinction, the decision implies that had suspension been possible in *Mobile* the Court might well have felt bound to follow the *Tyler* decision. In other words, the Third Circuit Court undoubtedly felt impelled to reach its conclusion in large measure because the increase became effective without possibility of refund before any hearing could be held on the matter.

The *Mobile* case is of no value as authority in this case in other respects. The Court there assumed that under Section 4(e) "No consideration will be given to the accepted contract, the circumstances under which it was entered into, the long-term commitments sanctioned by the Commission and whether the rate fixed by it is unreasonable and against the public interest under the facts."[17] This assumption was entirely unjustified since it is well established that the Commission must take into account all aspects of the public interest and, to the extent that they were relevant to the public interest, the court should have assumed that the recited matters would be considered. This is exactly what the Commission did in the instant case under the Federal

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[16] 215 F.2d 883, 885 (1954).

[17] 215 F.2d 883, 886 (1954).

Power Act when it received evidence on and considered all of the matters which the Court in *Mobile* assumed it would ignore.

Finally, the Court in *Mobile* tried to distinguish the decision in *Midland Realty Co. v. Kansas City Power & Light*

Co., 300 U.S. 109 (1937), which the Court admitted gave some support to the Commission on two grounds: (a) that Midland did not assert its contract before the Commission, but attempted to attack the rate increase collaterally, and (b) that the decision was based upon a State Court interpretation of a State Statute.[18] The second ground is, of course, equally applicable to the decision in the *Wichita* case on which the Third Circuit relied. The first ground points up the fact that there is no lack of jurisdiction in the Commission to modify a contract rate by the method adopted below, for if it were a jurisdictional matter it would seem that it could be raised collaterally. The *Mobile* decision would imply that the existence of a contract is at most a type of affirmative defense which is waived if not presented before the Commission. Even so, it could not be an absolute defense, for to make it so would permit a utility by contract to deprive the Commission of its rate-fixing power. At most, therefore, an existing rate contract can be but one matter to be considered by the Commission in determining whether a rate increase requested by a public utility is in the public interest, and such consideration was in fact given by the Commission below. Finally, the Court missed the real point of the *Midland* case which is, simply, that there is no constitutional objection to the "filed rate" policy of rate making.

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[18] 215 F.2d 883, 887 (1954).

2. The Reasoning of Wichita Is Not Applicable to the Case at Bar.

In *Wichita,* this court had before it for review a proceeding of the Kansas Public Utilities Commission made upon pleadings and heard under the provisions of Section 13 of the Public Utility law of Kansas.[19] This section, in language similar to Section 206(a) of the Federal Power

Act, conditioned the power of the Commission to change rates upon a finding that the existing rate was unjust or unreasonable. The order of the Commission changing a contract-specified rate was attacked on the ground that no such finding had been made. This court held that for lack of such a finding the Commission's order was void.

Section 20 of the Kansas Act permitted a change in rates to be made effective by a filing with the consent of the Commission. Although this is similar in some respects to Section 205(d) of the Federal Power Act, no provision was made in the Kansas Act for a hearing after such filing, as is provided by Section 205(e) of the Federal Power Act. The court did not have before it[20] the effect of a filing under section 20 and its comments thereon may be disregarded for the purposes of this case because (1) they were purely *dictum,* (2) they refer to a rate filing procedure which does not provide for a hearing as does Section 205, and (3) they were based entirely upon a construction of the Kansas Act by the Kansas Supreme Court in a prior case and hence do not represent the independent judgment of this Court. In view of the full discussion of the *Wichita* case in the brief before this Court for the Commission in the *Mobile* case, Case No. 31, further elaboration of our argument with respect to the *Wichita* case is unnecessary here.

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[19] Kan. Sess. Laws 1911, c. 238.

[20] "The section does not, therefore, cover, or measure the essentials of, the proceeding in the case before the Commission, which the order shows was upon pleadings and *inter partes.*" *Wichita R.R. v. Pub. Util. Comm.,* supra, at p. 57.

II. In Any Event, the Commission Actually Found, Upon an Expressly Framed Issue, that the Contract-Specified Rate Was Unreasonable Before Authorizing the Rate Increase.

The first point of the argument has shown that the instant proceeding was properly initiated under Section 205 of the

Act. This second point will show that in any event the substantive requirements of Section 206(a) have also been squarely and expressly met and therefore the Commission's order should have been upheld even under the court's rationale.

The only difference between the Section 205 and Section 206(a) procedures considered by the court below was the requirement of the latter that a rate change be made only if the Commission finds that the existing rate is unreasonable. We have pointed out that this requirement of Section 206(a) adds nothing of substance to what the Commission is required to do under Section 205(e). However, even if the view of the court below were accepted, the Commission's order should still have been affirmed for the plain reason that the Commission made the required finding, not by indirection or implication, but in clear and unmistakable language after careful consideration upon an issue duly framed by the parties. This finding was made in a separate portion of the Commission's opinion dealing with Sierra's contention that this case was governed by Section 206(a). Undoubtedly, the finding was made for the very purpose of making further proceedings unnecessary in the event that the Commission had misconstrued Section 205 of the Act.

Despite the Commission's clear language to the contrary, the Court below assumes that the Commission did not find the 1948 contract-specified rate to be unreasonably low and hence unlawful. Furthermore, by its order directing dismissal of the proceedings, the Court below usurps the function of the Commission and makes impossible the correction of the alleged error in the original proceeding.

The Commission, in the new proceeding contemplated by the Court below, will have no power to grant reparations. Consequently, PG&E would be deprived by the Court's

[31]

order of any increased revenue from Sierra for a period of more than two years, that is, since the effective date of the rate under review. Commission consideration of the reasonableness of that increased revenue would be precluded. Neither sound administrative procedure nor the requirements of judicial review necessitate such an unjust result.

A. The Issue of Whether the 1948 Contract-Specified Rate Was Reasonable or Unreasonable Was Presented to the Commission in This Proceeding.

In an administrative proceeding, such as this, formal pleadings are not encouraged. Furthermore, the Federal Power Act specifically provides that "no informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule or regulation, issued under authority of this Act."[21]

To determine whether an issue was raised in an administrative proceeding so that it may be decided in that proceeding is merely to see that the essential requirements of due process were met, namely, that the parties were sufficiently informed of the points at issue. The purpose is to afford parties a full opportunity to present testimony and to prevent surprise. The record in this proceeding shows that both Sierra and PG&E considered the reasonableness of the 1948 contract-specified rate to be an issue and that evidence, argument, and proposed findings were received from them on that issue by the Commission. Furthermore, the question of the reasonableness and hence the lawfulness of the 1948 contract-specified rate was raised right at the start of, and on numerous other occasions during, this proceeding. A brief review (R. 491) of some of the salient points in the record demonstrates this.

[32]

The Commission, in suspending PG&E's rate filing and ordering a hearing, stated Sierra's contention to be that the 1948 contract-specified rate "is just and reasonable and not unduly preferential or discriminatory because of other considerations for the rendering of service, at the time the present agreement was entered into" (Order of March 12, 1953, R. 431-434). In permitting Sierra to intervene in this proceeding and denying Sierra's request for rejection of the rate filing because not authorized under Section 205(d) of the Federal Power Act the Commission expressly stated that the denial was without prejudice to Sierra's right to maintain its contentions. Furthermore, in refusing Sierra's petition for rehearing on the order denying Sierra's request for rejection of the filing, the Commission said that its denial "was conditioned to preserve to Sierra its right to maintain thereafter in this proceeding the contentions then advanced by it and did not constitute a final determination by this Commission of the substantive issue as to which Sierra now seeks rehearing."

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[21] Sec. 308; 16 U.S.C. 825g.

At the hearing, the Examiner for the Commission took the position that he was required to admit evidence material to Sierra's contentions in view of the Commission's preservation of Sierra's rights and all such evidence offered by Sierra was received. The Commission stated in its opinion that "all parties were afforded an opportunity to present evidence in support of their respective positions" (R. 446).

At the conclusion of the hearing, PG&E submitted proposed findings including a finding that the contract rate is unjust and unreasonable. Sierra submitted at the conclusion of the hearing proposed findings that the 1948 contract-specified rate is just and reasonable and that PG&E failed to show the contrary.

In rendering its opinion the Commission gave careful and detailed consideration to the lawfulness of the 1948 contract-specified rate, not merely as an incident to the issue of lawfulness of the proposed rate but in a separate portion of its opinion directed to this very issue (R. 464-466).

When the court below and Sierra urge that the Commission in this proceeding may not find the 1948 contract-specified rate unlawful, they go counter to the present practice of courts. The courts have taken the position for many years that where a party clearly understands the issue he cannot take advantage of a technical defect in the manner of stating the issue.[22]

B. The Commission Expressly Found the 1948 Contract-Specified Rate to Be Unreasonable.

A reading of the Commission's opinion shows that it found the 1948 contract-specified rate to be unlawful. It did this several times and very clearly.

First, the Commission said:

> "* * * we may point out that if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful." (R. 464).

Second, it pointed out that:

> "* * * none of the evidence in this record warrants a finding that any rate would be reasonable that would [34] produce a return of substantially less than the 4.75% resulting from the proposed rate, which is the minimum P. G and E. is willing to accept" (R. 464).

Third, after considering Sierra's arguments including those concerning undue discrimination and preference, the Commission stated:

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[22] *New York Central & H. R. R. Co. v. Interstate Commerce Commission*, 168 Fed. 131, 138-139 (C.C.N.Y. 1909). See, for example *National Labor Relations Board v. Mackay Radio & T. Co.*, 304 U.S. 333, 350 (1938) where the court said: "While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory."

> "But no such considerations, on this record, warrant a conclusion that any rate substantially lower than that proposed would be reasonable, and hence we would have to conclude that the 1948 contract rate is now unreasonable and unlawful" (R. 466).

But the Commission did not make merely the bald finding that the 1948 contract-specified rate is unlawful, it discussed the evidence bearing on this issue which had been presented to the Commission by both Sierra and PG&E throughout the hearings. Hence the path[23] which the Commission followed in making this finding can be discerned readily from its opinion.

It is clear, therefore, that despite the statement of the court below, the Commission literally found the 1948 contract-specified rate to be unlawful even though it believed such finding to be unnecessary and so stated.

The court below, in concluding that no such finding was made, may have relied on the fact that it was not among the numbered formal findings at the end of the Commission's opinion. But all findings need not be formally listed and numbered. The Commission expressly incorporated the finding as to the unreasonableness of the 1948 contract-specified rate as a part of its formal findings by prefacing the numbered list with the following introductory statement:

> "The Commission, having considered the record with respect to the matters involved and the issues presented and having issued its Opinion No. 270 which is

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[23] Even where findings of a Commission are inadequate, this court has upheld the Commission's determination where "the path which it followed can be discerned." Cf. *Colorado Interstate Gas Co. v. Federal Power Commission,* 324 U.S. 581, 595 (1945).

> hereby incorporated by reference and made a part hereof, *further finds:*" (R. 466). [Emphasis added.]

To say that under such circumstances the Commission has not found that the 1948 contract-specified rate was unreasonable and unlawful is to give weight to form and to ignore substance. "It is enough if the findings be unambiguously stated, whether in narrative or numbered form, so that it appears definitely upon what basic facts the Commission reached the ultimate facts and came to its decision."[24]

C. Even Assuming That an Express Finding Were Lacking There Is an Implied Finding Which Is Sufficient to Support the Commission's Order.

The procedural question presented here is whether the court of appeals may ignore what the Commission expressly said it would have found concerning the prior rate if such finding were deemed necessary.

In judicial proceedings a failure of a court to make a finding on a determinative issue does not warrant reversal where evidence supports an implied finding which if expressly made would be adverse to an appellant.[25] Furthermore, although the general rule is that a finding outside the issues pleaded must be disregarded, modern procedure does not permit parties who voluntarily submit and try an issue without any specific pleadings to complain when the findings concern such an issue not within the pleadings.[26] *A fortiori,* an implied finding in an administrative proceeding, where all issues are not necessarily framed as specifically as in judicial proceedings, should not be ignored and given no effect. It is not necessary for the Commission to set out its findings in the formal style and manner customary in trial courts.[27]

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[24] Judge Stephens in *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F. 2d 554, 559 (C.C.D.C. 1938) *cert.* denied *Gross v. Saginaw Broadcasting Co.*, 305 U.S. 613 (1938); Accord. *Johnston Seed Co. v. United States*, 191 F. 2d 228, 230 (10th Circ. 1951).

[25] *Reiniger v. Hassell*, 216 Cal. 209, 13 P.2d 737 (1932); *Kustoff v. Chaplin*, 120 F.2d 551 (1941).

III. It Was Error to Order the Proceeding Dismissed when the Finding, If Required, Could Have Been Supplied on Remand and When Dismissal Would Constitute a Rate Decision Which Only the Commission Could Make.

A. Even If the Commission Had Not Found the 1948 Contract-Specified Rate to Be Unreasonable, It Should Be Permitted to Do So in This Proceeding.

Even if the Commission had said nothing in its opinion and order concerning the unreasonableness of the 1948 contract-specified rate, it should not be precluded from making a finding concerning it in this proceeding.

Assuming for the moment that the court below is correct in insisting that the Commission may not authorize the new rate without first expressly finding that the previously filed 1948 contract-specified rate is unjust and unreasonable, both justice and its efficient administration require the court to authorize the Commission to correct its error *in this proceeding.* To throw out the days of hearing, the exhibits and the arguments in this proceeding before the Commission will cause injustice as well as a great waste of effort and expense.

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[26] *Freeman v. Gray-Cowan, Inc.,* 219 Cal. 85, 25 P.2d 415 (1933).

[27] Judge Stephens in *Saginaw Broadcasting Co. v. Federal Communications Commission, supra,* fn 24.

By remanding the case to the Commission for further proceedings the Commission would have an opportunity to

correct its alleged error and to fix the just and reasonable rate in accordance with law. Neither Sierra nor PG&E would then be prejudiced by the alleged failure of the Commission to have made a formal finding on the 1948 contract-specified rate. To proceed otherwise and thereby to require an entirely new proceeding to be instituted could mean that Sierra would have had the advantage of the 1948 contract-specified rate during a period when it was unreasonably low. Such a result flies in the face of the intent of Congress, expressed in Section 205(e), that a selling utility, when it files a new rate, may have a new rate go into effect (subject to refund) not later than five months after its proposed effective date.

Since the rate increase became effective on September 6, 1953, PG&E has collected increased charges from Sierra at the higher rate. The increase was originally estimated at about $420,000 per year and has actually exceeded that amount because of increased sales. If the Commission should find that the contract rate was reasonable, this increase would have to be refunded to Sierra. If, on the other hand, the Commission makes a contrary finding, PG&E in equity and good conscience should be entitled to retain the increase since the unreasonableness will relate to the entire period during which the increase was collected. See *Atlantic Coast Line R. Co. v. Florida,* 295 U.S. 301 (1935).

The proceeding to date has occupied the time and attention of a considerable number of persons, including the Commission itself, and engineers and other experts on the staff of the Commission, and in the two utilities. To ignore the existing record in a new proceeding would be both wasteful and unnecessary.

Sierra was given and took every opportunity during the proceeding to present its case concerning the reasonablness of the contract rate. Sierra went into great detail in describ-

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ing the circumstances and negotiation of the 1948 contract in an effort to establish that the 1948 contract-specified rate was a just and reasonable one. Since all material pertinent to the issue of the reasonablness of that rate was introduced in the proceeding, the initiation of a new proceeding, merely because the Commission at the conclusion of the hearing stated that a finding concerning the 1948 contract-specified rate was unnecessary, would serve no useful purpose. The new proceeding would be but a duplication of the prior hearings.

That the present proceeding was initiated as a result of the filing as provided for under Section 205(d) rather than a complaint under Section 206(a) should not govern the result. To permit this case to depend upon how it was initiated would indeed be harking back to the days when a common law plaintiff selected a writ at his peril, and the result would be just as inequitable in this modern administrative proceeding as it became under the technical and inflexible common law procedure.

Sierra cannot be prejudiced in any sense by returning the case to the Commission for a more formal determination as to the unreasonableness and hence unlawfulness of the 1948 contract-specified rate if such is deemed necessary. If Sierra's contention is sustained, it will lose nothing. If not, it will be charged only with the rate which is just and reasonable in accordance with the law as laid down by the court below.

B. The Court Below, by Refusing to Permit the Commission in This Proceeding to Find Unreasonable the 1948 Contract-Specified Rate, Has Usurped the Commission's Regulatory Authority.

By refusing to permit the Commission the opportunity to correct its alleged mistake in this proceeding, the court below has invaded the functions of the Federal Power Commission.

Having pointed out the alleged mistake of law which it believes affected the Commission's decision, the court below should have sent the case back for further proceedings if deemed appropriate by the Commission. *Federal Power Commission v. Idaho Power Company,* 344 U.S. 17 (1952). However, the court below remanded the case to the Commission with instructions to dismiss the present proceeding. This has the same practical effect as if the Commission had decided that the 1948 contract-specified rate should be maintained. In this connection it should be remembered that, unlike the usual judicial proceeding, the administrative fixing of rates is a constantly recurring matter in which the time of decision and the effective date of the decision are most important.

Any alleged failure of the Commission to make a finding as to the reasonablness of the 1948 contract-specified rate is not the equivalent of a finding of the reasonableness of that rate, especially when the Commission has expressed its conclusion to the contrary. Although the court below may not have believed that it was making that decision for the Commission, it has done so, in effect, by ordering the dismissal.

In short, the order of the court below amounts to a finding that the 1948 contract-specified rate is the lawful rate; but only the Commission by statute is authorized to make such a finding. By ordering the Commission to dismiss this proceeding the court below has acted in disregard of the firmly established principle that courts will stay their hands until the expert administrative agency to which Congress has entrusted a policy or factual determination has had the opportunity to act. *Far East Conference v. United States,* 342 U.S. 570 (1952).

> "* * * the guiding principle, violated here, is that the function of the reviewing court ends when an error of
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>
> law is laid bare. At that point the matter once more goes to the Commission for reconsideration."[28]

IV. The Order of the Commission Is Fully Supported by the Evidence.

The opinion of the court below does not consider Sierra's argument that the lawfulness of the new rate is not supported by the evidence. Since this court in order to affirm the Commission's order may wish to assure itself that the Commission's order is fully supported by the evidence, we review briefly the pertinent parts of the record. We shall show that the Commission's findings, namely, (1) that the new rate is lawful, and (2) that the 1948 contract-specified rate is unlawful, are fully supported by the evidence.

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[28] *Federal Power Commission v. Idaho Power Co.,* 344 U.S. 17, 20 (1952).

A. The Lawfulness of the New Rate Is Supported by the Evidence.

1. The Cost of Service Method of Testing Reasonableness Shows the New Rate To Be Reasonable.

With the new rate in effect, the rate of return to PG&E based on the cost of rendering the service to Sierra would be less than 5½%. Sierra stipulated that 5½% would be a reasonable rate of return for PG&E's electric operations as a whole (R. 21). The evidence showed that the estimated rate of return under the new rate would be 3¼% under PG&E's methods of computation and 4¾% under the Commission's methods (R. 295).

2. The Rate of Return Under the New Rate Will Not Exceed the Rate of Return Expected Under the 1948 Contract-Specified Rate.

The Commission expressly considered the possibility that PG&E's entry into the 1948 contract showed that the then foreseeable rate of return under that contract would be the

rate of return which is still reasonable for service to Sierra. Without passing upon the question of whether this was a proper basis for determining the reasonable rate of return, the Commission found that, due to increases in cost which occurred in the five years subsequent to negotiation of the contract, the proposed increase would merely restore the reasonably foreseeable rate of return, not go above it. (R. 452) This conclusion was fully supported by Exhibit 35 Revised (R. 356-408), which was summarized and discussed in the Commission's opinion (R. 452-454). Sierra's attempt to use certain other computations to show a contrary result was considered at length by the Commission and rejected. This brief will not consider the matter further because it is clear that the Commission's conclusion was fully supported by the comparison of rates of return under costs actually experienced with rates of return on the basis of costs actually forecast by PG&E's management. Even the figures on which Sierra attempted to rely showed the need for an increase in rates to cover increased costs.

3. The Commission Gave Careful Consideration to Sierra's Special Situation Arguments and Rightly Rejected Them.

Sierra's arguments centered on the contention that by the 1948 contract it gave up opportunities to obtain power from other sources of supply, its evidence being directed primarily to discussions with the Bureau of Reclamation as to possibly obtaining power from the Bureau's Shasta Dam. The following evidence in the record substantiates the Commission's finding that "in 1948 Sierra regarded other sources of supply as being so unacceptable that PG&E became, in fact, the only feasible source":[29]

(1) Sierra's own intra-company memoranda (R. 347-355) which state the reasons why Sierra found Bureau of Reclamation power unacceptable.

(2) The Bureau could not possibly deliver any power to Sierra prior to 1951 (R. 27, 36-37, 211). Hence the Bureau could not be considered a competitive source for power which had to be available in 1949 and thereafter to avoid a power shortage. Sierra could not con-

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[29] R. 451.

struct new plants in time to supply its needs, for its president and its engineer testified that construction of additional plants would take at least three years.

(3) The Bureau could not have provided the firm source of power needed to carry Sierra's utility load, because of the possibility of serious and prolonged interruption of service over a single long transmission line over rugged terrain and the further possibility of inadequate water supply for Bureau generation (R. 37-38, 40-41, 222-226, 229-230, 347-348, 350, 351, 353-355).

(4) A contract with the Bureau would have required Sierra to wheel, that is, transmit electric power, for the Bureau to preference wholesale customers, making municipalities served by Sierra subject to raids by "public power" advocates (R. 345-346, 347, 355).

(5) The Bureau of Reclamation rates would have been subject to possible future increases (R. 347, 315-316).

B. The Unreasonablness of the 1948 Contract-Specified Rate Is Well Established by the Evidence.

As we have stated before, a separate consideration of the unreasonableness of the contract-specified rate does not bring into play any factors in addition to those involved in determining the reasonablness of the proposed rate. However, for completeness, we consider the evidence from

the standpoint of the contract-specified rate to show that the Commission's finding that it is unreasonable is fully supported.

The rate of return under the contract-specified rate for the test year 1952 based on the method of computation requested by the Commission staff was 2.60%.[30] This rate of return was clearly unreasonably low by comparison with the 5½% rate of return which Sierra and the Commission stipulated is reasonable for PG&E's operations.[31] This alone would support the Commission's conclusion.

The only controversy arises from Sierra's attempt to prove that special circumstances relating to the 1948 contract required a conclusion that the contract-specified rate remained reasonable, despite the decline in rate of return. It was clearly established that the poor rate of return derived from service to Sierra in 1952 was the result of the very substantial increases in PG&E's costs after negotiation of the 1948 contract.[32] It was necessary, therefore, for Sierra to show that its contract with PG&E should insulate it against rate increases as a result of increases in PG&E costs.

It is clear that a contract for utility service specifying a rates does not grant immunity from rate changes as a consequence of cost changes. This follows from the fact that,

as even Sierra concedes, contract-specified rates are subject to change by regulatory authority and the fact that cost of service is a primary consideration when a regulatory authority is engaged in the rate-making process. It can scarcely be contended that a utility could assert the existence of a contract to avoid a rate decrease when its costs decline.

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[30] See Exhibit 19 (R. 295).

[31] R. 21.

[32] R. 356-408, especially table at R. 363. In referring to this exhibit, it should be noted that the rates of return developed therein are not directly comparable with the rates of return shown in Exhibit 19, such as the 2.60% above mentioned, because of different methods of approach. The methods used in Exhibit 35, Revised, were adopted to simplify the task of making comparative studies for a period of years. It was not disputed that these methods validly show the relative rates of return under the various assumptions considered in that exhibit.

The Commission's decision in this case was based on the conclusion that no special effect should be given to the fact that the rate to be increased was embodied in a contract. In 1948, shortly after the contract was negotiated, Sierra was of the same opinion for, in explaining the reason for having a contract for a 15-year term, its president stated this was to provide "a proper return on the investment for that period" by PG&E to provide capacity to serve Sierra (R. 207).

The Commission was convinced after consideration of Sierra's arguments that sufficient reason was not shown for departing from its cost of service approach. There is no reason for a Court to substitute any other conclusion for that of the Commission.

Conclusion

It is submitted that this rate increase proceeding was lawfully initiated, that all issues which had any possible relevancy to a determination of the just, reasonable and lawful rate for service to Sierra were fully considered by the Commission and expressly disposed of by its opinion and order herein and that its conclusions were fully supported by the evidence. The order of the United States Court of Appeals for the District of Columbia Circuit dismissing the proceedings before the Commission should be reversed and the opinion and order of the Commission should be affirmed.

Respectfully submitted,

ROBERT H. GERDES
F. T. SEARLS
245 Market Street
San Francisco 6, California

ROBERT E. MAY
WHEAT, MAY AND SHANNON
520 Shoreham Building
Washington 5, D. C.

Attorneys for Petitioner,
Pacific Gas and Electric
Company

Of Counsel:

JOHN C. MORRISSEY
MALCOLM A. MACKILLOP
245 Market Street
San Francisco 6, California

[No Number]

In the Supreme Court of the United States

October Term, 1955

No. 51

Federal Power Commission,
Petitioner,
vs.
Sierra Pacific Power Company,
Respondent.

No. 53

Pacific Gas and Electric Company,
Petitioner,
vs.
Sierra Pacific Power Company.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

Brief for Respondent Sierra Pacific Power Company

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BRIEF FOR RESPONDENT
SIERRA PACIFIC POWER COMPANY

Questions Presented

1. Whether a contract to sell electricity at wholesale at a special low rate for a fixed period of years which has been accepted for filing as the legal rate by the Fed-

[2]

eral Power Commission is binding upon the parties until and unless abrogated by the Federal Power Commission after a hearing and finding that it has become unreasonable and against the public interest, or whether such a contract may be abrogated at any time by the selling company itself by the mere filing of a schedule of higher rates.

2. Whether, if Congress delegated its power to abrogate duly filed private rate contracts exclusively to the Federal Power Commission, that Commission can accept for filing and permit to become effective a proposed schedule filed by a utility company under Section 205(d) of the Act which increases the contract rate without the consent of the purchaser, in the absence of any hearing or finding that the contract rate is unreasonable and against the public interest.

3. Whether the statement by the Commission in its order approving an increase filed under Section 205(e) that if necessary it would find the contract too low and therefore unreasonable constitutes the finding of unreasonableness required by the Act, and whether, even if it were so construed, such a finding would retroactively

abrogate the contract and validate the rate increase previously filed and permitted to become effective in 1953 under Section 205.

4. Whether, regardless of the legality of the contract, it was an abuse of administrative discretion for the Commission on the record of this case to permit Pacific Gas and Electric Company to increase the contract rate unilaterally in the absence of any showing that the public interest is injuriously affected thereby.

[3]

Statement of the Case

Because of the persistence with which both petitioners, as well as the Federal Power Commission[1] itself in its opinion and order here under review, attempt to gloss over the shocking impropriety of Pacific Gas & Electric Company's[2] attempt to repudiate its solemn agreement, and to belittle and even deny the unassailable equities in favor of Sierra Pacific Power Company,[3] we deem it necessary to outline the facts disclosed by the record in some detail, so that the Court will have a complete picture of what has actually taken place.

The Parties

Sierra is a public utility under the laws of the States of Nevada and California. It generates, transmits and distributes electricity, water and gas to its customers, the consumers of nothwestern and central Nevada and eastern California. Its service area embraces such centers as Reno and Carson City, Nevada and Lake Tahoe in California, and the surrounding regions (R. 5, 467).

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[1] Hereinafter referred to as "the Commission".

[2] Hereinafter referred to as "PG&E".

[3] Hereinafter referred to as "Sierra".

PG&E is a California corporation and a public utility under the laws of that State and under the provisions of Part II of the Federal Power Act (Act of August 26, 1935, c. 687, 49 Stat. 847, U.S.C.A., Title 16, § 824(e)). It is the company which serves most of north-central California from the San Francisco Bay area and the Pacific Ocean eastward to the Sierra Nevada Mountains, and from Bakersfield and Santa Ynez in the south to Eureka and Redding in the north.

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Past Dealings Between the Parties

Since 1923 Sierra has purchased a portion of the electricity needed to serve its customers from PG&E and is today dependent upon PG&E for the great bulk of that energy.[4] The purchases have been carried out under long-term contracts between the companies. The first was entered into in 1923 (R. 6, 443, 468), and was succeeded in 1938 by a 15-year contract to run to 1953 (R. 443, 468). Each contract fixed a rate during its term, and under each PG&E agreed to build a transmission line from its power plants in the Sierra Nevada Mountains at Drum and Spaulding, California, to a metering station near the Summit Hotel in the Donner Pass in California (R. 443). At this point delivery was made to Sierra, which transported the power over its own lines from that point to its own service area (R. 138, 443). The contracts provided for a substantial penalty if Sierra obtained any power from a source other than its own existing plants located in the State of Nevada.

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[4] In 1952 Sierra purchased approximately 77% of the kilowatt hours which it needed from PG&E (R. 467).

Each contract was approved by the Public Service Commission of California (then known as the Railroad Commission) and was filed with the Federal Power Commission as PG&E's Rate Schedules FPC Nos. 1 and 2, respectively (R. 468).

Negotiations Leading Up to the Present Contract

With the end of World War II it became apparent that Sierra's rapidly increasing demands would require either the construction of an additional transmission line into its area by PG&E, or the development of a new source of power before the expiration of the 1938 contract in 1953 (R. 5-6, 21-23).

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At the same time vigorous agitation for lower electric rates had developed among Sierra's consumers in Nevada and their public officials (R. 12-13, 16-17, 28-29, 336-341). One of the causes of this agitation was that the State of Nevada had never made use of the share of so-called "cheap government power" (R. 12-13) from Boulder Dam to which it was entitled under the Act of Congress setting up the Boulder Dam Power Project. (Act of December 21, 1928, c. 42, 45 Stat. 1057, U.S.C.A., Title 43, § 617 *et seq.*) (R. 171-173, 336-337.)

Sierra called its problems to the attention of PG&E. According to a report made by the manager of PG&E's own Commercial Department after a field investigation in Nevada, Sierra was at that time considering five possible sources of power, other than PG&E, in its search for lower rates, including various plans for obtaining power from the United States Bureau of Reclamation, building its own steam plants in Nevada, and other possibilities (R. 166-176). After calling attention to the widespread agitation for lower rates in Nevada, the report recommended that PG&E study the possibility of supplying Sierra at more favorable rates (R. 175-176).

On January 22, 1947, PG&E offered to construct the necessary third transmission line in consideration of a new 15-year contract at substantially the same rates as those provided for in the 1938 contract, but with the addition of an escalator fuel clause under which the rate would increase as PG&E's fuel costs increased (R. 11-13, 179-183). Sierra refused to accept this proposal and thereupon, with the full knowledge of PG&E (R. 336-341, 415-416), it turned to intensive negotiations with the Bureau of Reclamation and other agencies in an effort to comply with the public demand for "cheap government power" (R. 336-341).

On August 15, while these negotiations were in progress, the Bureau wrote to PG&E to inquire whether it would

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be prepared to "wheel" Government power from Shasta into Nevada over its existing lines, the power to be sold to local distributing companies (i.e. Sierra) (R. 415-416).

On October 4, 1947, Sierra finally rejected PG&E's proposal of January 22nd (R. 10-12, 339-341), and on October 6, PG&E's management for the first time determined to study the possibilities of offering Sierra a special low rate, known as "P-31", and to compare the results of service under that rate with the proposals of the Bureau of Reclamation to furnish power from Shasta Dam in its Central Valley Project in Northern California (R. 339-341, 416-424).

By that time the various proposals for obtaining power through the Bureau had been reduced to two: (1) the above mentioned proposal that PG&E should enter into an "exchange" or "wheeling" agreement whereby it would transport Bureau power from Shasta Dam to Summit for the Bureau's account, where it would be sold by the Bureau for Sierra's use (R. 415-416, 424, 331-334); and (2) a proposal that the Bureau would build one or more new lines to transport Shasta power directly over the Sierra Nevada Mountains into Nevada, where it would be sold to Sierra at the Bureau's publicly advertised resale or "postage stamp" rate (R. 305-307, 23-28).

The studies made by PG&E's management showed that PG&E could meet the Bureau's exchange or "wheeling" proposal by purchasing power from the Bureau at Shasta Dam for its own account under its existing contract with the Bureau and selling it to Sierra at the P-31 rate (R. 416-424). The studies also indicate that while the Bureau's proposal to sell power directly to Nevada at its "postage stamp" rate over a new line to be constructed over the mountains would produce a substantial saving to Sierra,

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the cost to the Bureau of constructing // the line would seem to be prohibitive, although the studies indicate that "Sierra Pacific believes it will be" done (R. 424). These studies will be discussed more fully in Point V, *infra.*

Following these studies, PG&E on October 25, 1947, finally acceded to Sierra's insistent demand for a lower rate, and offered Sierra a 15-year contract at the P-31 rate. Moreover, the escalator fuel clause to which Sierra had objected was eliminated, thus removing any possibility that the rate could be increased during the life of the contract because of possible increases in PG&E's future fuel costs (R. 11-13, 28-29, 138-146).

PG&E's P-31 rate is a special rate (R. 299), considerably lower than the rate then in force under the 1938 contract between PG&E and Sierra, which had been promulgated by PG&E in 1945 for the express purpose of enabling PG&E to meet competition and hold existing business (R. 148-149). It was to apply only to sales of power by PG&E to resale customers who signed contracts for not less than five years, and was not expected to return the full allocated cost of service, although designed to exceed the loss which PG&E would suffer if it lost existing business (R. 151-164). One of its avowed purposes was to assure the customer that it would receive the agreed low rate at least for the duration of the contract (R. 162-163).

This schedule had been approved by the California Public Service Commission (then the Railroad Commission) on October 16, 1945, on the express condition that any loss from such service must be borne by the stockholders of the utility and could not be passed on to PG&E's other customers (R. 149).

Before accepting PG&E's offer Sierra's rate engineer prepared studies comparing the cost to Sierra under the P-31 rate with the cost under the Bureau's proposal

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to build a new line from Shasta and sell directly to Sierra at its "postage stamp" rate. While these studies showed that the rates under the Bureau's proposal would be considerably more favorable to Sierra over a 15-year period even than the P-31 rate offered by PG&E, nevertheless the studies also showed that the Bureau would be unable to construct the new line in sufficient time to meet Sierra's anticipated peak demands in the ensuing years (R. 14-16, 29-34). Accordingly, Sierra's management finally determined in late December, 1947 to accept PG&E's proposals (R. 16). After some months of negotiation over the details the contract was finally entered into on March 4, 1948, subject to approval by the California Commission (R. 138-146).[5]

After hearings at which the Commission obtained PG&E's commitment that the burden of the low rate would be absorbed by it, and not passed on to PG&E's other customers (R. 202) the California Commission approved the contract on April 27, 1948 (R. 260-266). Thereafter it was duly filed with the Federal Power Commission as PG&E's Rate Schedule FPC No. 3 (R. 468).

While the Threat of Competition Remains PG&E Asserts It Would Be "Double Dealing Repudiation" to Seek to Increase the Rate

In the year following the adoption of this agreement, PG&E filed a petition with the California Commission seeking a general 6% rate increase, but expressly requested permission to exempt some 21 of its customers who had contracts under the P-31 rate, including Sierra,

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from this increase on the ground that the contracts had been negotiated under competitive conditions (R. 268-271). As PG&E's counsel stated at the hearing in support of the proposed exemptions, "anybody would agree that we would be accused of double dealing repudiation" if PG&E sought to increase these contract rates (R. 278).

In authorizing the 6% increase as well as the exemption of the P-31 customers, the California Commission in an order dated March 21, 1950, stated that the exemptions were justified on the ground "* * * that the making of such special contracts was compelled largely by competitive conditions * * *" (R. 292-293) and that, "In approving such special contract rates in the past, we indicated that, if the revenue therefrom should fall below the cost of service, the loss would not be permitted to burden the other classes of customers" (R. 293).

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[5] In 1948 Sierra was PG&E's sole interstate purchaser, so that any injury resulting from the low rate provided for in the contract would fall upon its intrastate customers over whom the California Commission had sole jurisdiction.

As Soon as the Threat of Competition is Removed PG&E Tries to Repudiate its Low Rate Contracts

By 1952 PG&E had entered into a new comprehensive contract with the Bureau to transport or "wheel" power generated at Shasta Dam to the Bureau's customers within a defined area (which does not include the area served by Sierra) and to purchase the balance of the power generated at Shasta for its own use (R. 17-18).[6] By that time, also, the cost of construction of steam plants had become almost prohibitive for a company situated as Sierra is. Thus the major sources of competitive power in the area were no longer available to Sierra (R. 17-20, 58-61).

Accordingly, when in 1952 PG&E again applied to the California Commission for a general increase of approximately 18%, it no longer sought to exempt Sierra and the other P-31 contract customers, with the exception of the City of Redding, which PG&E sought to exclude from the increase on the express ground that, because it was located within a few miles of the Shasta Dam, the danger of Bureau competition still existed (R. 280-282).

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[6] In its brief in the Court below PG&E asserted that this statement was "false". We thereupon communicated directly with Mr. Calland, Acting Regional Engineer of the Bureau, who had conducted negotiations with Sierra in 1947, and were informed by him that all of the Bureau's available power was presently tied up partly by the general wheeling agreement above referred to and partly by another agreement whereby PG&E wheels 290,000 Kw's to the Sacramento Municipal Utility District for the Bureau's account.

The California Commission Refuses to Permit PG&E to Repudiate its Contracts

While authorizing the general rate increase which PG&E had sought, the California Commission refused to permit PG&E's attempted repudiation of its contracts (R. 282-291) and expressly stated that it would so compute PG&E's general rate schedule as to insure that "* * * no burden [from the low contract rates] will be placed on the other classes of customers but any burden will fall on the stockholders' portion of the earnings until such time as the contracts may have been renegotiated and have been authorized by the Commission" (R. 285). After pointing out that the 15-year period in Sierra's contract was established "* * * to provide protection to both parties" (R. 283), the Commission concluded its order as follows:

> "In connection with these special contracts, we point out that the applicant, in order to forestall alleged government competition, requested authority from this Commission to enter into said contracts with the clear understanding that its stockholders must bear any burden which the applicant might sustain as a result of the operation of any such contracts. Therefore, equity calls for the treatment which we have accorded to these special contracts" (R. 285-286).

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Having failed to obtain the sanction of the California Commission in its attempted "double dealing repudiation"

(R. 278), PG&E initiated the present proceeding in the Federal Power Commission.

The Proceedings Before the Federal Power Commission

PG&E's proposal to increase the contract rate was filed on February 2, 1953 under the provisions of Section 205 of the Federal Power Act, which will be discussed more fully hereafter (Act of August 26, 1935, c. 687, Title II, 49 Stat. 851, U.S.C.A., Title 16 § 824d). Thereafter the Commission invited comments from the California Public Utilities Commission, the Nevada Public Service Commission, and Sierra. The California Commission refused to comment on the ground that a similar application by PG&E was then pending before it (R. 445). The Nevada Commission, which has jurisdiction over Sierra's resales to Nevada consumers, opposed the increase in a letter which said in part, "Had there been any doubt of the validity of the contract between the two companies, this Commission would have ordered Sierra Pacific Power Company to construct" additional facilities of its own to meet the increasing demand for power (R. 436). Sierra filed a petition and later an amended petition, objecting to the increase and requesting that the Commission reject the filing.

The burden of Sierra's petitions requesting that the Commission reject PG&E's filing was that it was improperly made under Section 205 of the Federal Power Act, under which Sierra contended that a contract rate could not be increased without its consent, pointing out that PG&E's proper procedure, if it had any ground for being relieved of its contract, was to bring a petition under Sec-

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tion 206 of the Federal Power Act (*supra*, at 49 Stat. 852, U.S.C.A., Title 16, § 824e), which expressly authorizes the abrogation of a contract by the Commission after a hearing and finding that it is unreasonable and against the public interest (R. 445).

In its order of April 17, 1953 granting Sierra leave to intervene but denying the other relief requested by Sierra in its petitions the Commission provided in part a follows:

> "Sierra's petitions in all other respects be and the same hereby are denied, without prejudice to the right of Sierra to maintain its contentions as to the effect of the filing of Supplement No. 1 under Section 205(d) of the Act, and as to the Commission's authority in this proceeding" (Order of the FPC *In the Matter of Pacific Gas and Electric Company,* Docket No. E-6482).

Sierra's petition for rehearing was dismissed on the ground that this was not a final order (R. 446). Accordingly, Sierra proceeded with the hearings and attempted to persuade the Commission that as a matter of law the contract rate could not be increased unless it was found to be unreasonable, and that, as a matter of fact, it did not injuriously affect the public interest, and therefore should be sustained. Sierra also sought to persuade the Commission that, regardless of the legal question involved, as a matter of equity it should follow the California Commission and refuse to sanction PG&E's blatant and unjustifiable attempt to repudiate a solemn obligation.

After hearings before a Presiding Examiner of the Commission, the intermediate decision procedure was dispensed with and briefs and oral argument were presented to the Commission on July 22, 1953 (R. 446). On September 21, 1953 the Commission ordered counsel to reargue certain questions which it specified, relating to the rate of return which had been foreseen, or had been reasonably foreseeable, by PG&E at the time it entered into the contract (R. 438-439). Although neither Sierra nor PG&E agreed that the questions proposed by the Commission were relevant to the issues in this proceeding, both sought to comply with the Commission's order (R. 446-447). Further hearings were held before the Presiding Examiner at which, despite the existence of the studies embodied in Exhibits 44 and 45 (R. 416-424), hereinabove referred to, which contained detailed studies of the cost of rendering the service, but of which Sierra was at that time unaware, PG&E asserted that before entering into the 1948 contract it had not made a cost of service study, nor any attempt to foresee the actual rate of return which it expected to receive under the contract over the 15-year period (R. 113-115, 107-108, 424). Accordingly, PG&E offered Exhibits Nos. 35 (Revised), 36 (Revised), 39, 40, 41 and 42 (R. 356-414), as an attempted reconstruction of the rate of return PG&E's management might have anticipated if they had made such a study in 1947 prior to entering into the contract. These Exhibits were prepared in part on the basis of certain facts which were available to PG&E's management at that time (R. 392).

At the close of this rehearing, Exhibits 44 and 45 hereinabove referred to were for the first time produced, during the cross-examination of PG&E's witness. Sierra offered these exhibits in evidence, as the only available evidence of the rate of return which PG&E had in fact anticipated from the proposed contract, and objected to the admission of PG&E's Exhibits Nos. 35 (Revised), 36

(Revised), 39, 40, 41 and 42 on the ground that they were not admissible as evidence, as they were purely hypothetical and concededly had not been considered by PG&E at

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the time it offered the P-31 rate (R. 133, 416, 424). This objection was overruled by the Presiding Examiner, although he expressed surprise that Exhibits 44 and 45 had not been produced by the Commission's Staff, in whose possession they had been for several months (R. 130).

On April 23, 1954 the reargument was had before the Commission, and on June 17, 1954 the Commission issued its Order and Opinion No. 270 (Commissioners Doty and Smith dissenting) which is the subject matter of this appeal (R. 443-470, 471-477).

The Commission's Order and Opinion

The majority of the Commission rejected Sierra's contention that the Federal Power Act did not authorize the unilateral abrogation of a duly filed rate contract by the mere filing of a new schedule under Section 205, and held that, on the contrary, that was the proper method of increasing a contract rate, provided the proposed increase was found to be not unreasonable by the Commission (R. 458-459). The majority further stated that, although it did not make any such finding, "* * * if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful" (R. 464-465).

The majority further found that the proposed new rate is not unreasonable although it, like the contract rate, would produce a return substantially less than the 5½% which is stipulated as generally a reasonable rate of return on the electric utility business of PG&E (R. 21). The Commission based its decision on the ground that "the company is willing to accept" the low rate because it "regards the deficiency of .75 of a percentage point as

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warranted in order to attract and retain this particular business in the face of the alternatives that may have been available to Sierra" (R. 464-465).

The majority also sought to justify its decision on the ground that "* * * the evidence also shows that such a rate of return [4.75] is not substantially different from the rate of return which it was willing to accept from this business at the time it negotiated the 1948 contract rate * * *" (R. 464-465). This conclusion is based upon the hypothetical rate study presented at the second hearing as Exhibit 35 (Revised) (R. 356-408), hereinabove referred to. The Commission also states that it finds "unconvincing" Sierra's contentions that it gave up opportunities to obtain power elsewhere in reliance upon this contract, and that it would be grossly unfair to increase the rate while leaving the other provisions in the contract unaltered.

Commissioners Doty and Smith, in their dissenting opinion, conclude that while the contract is "* * * subject to our regulatory modification for adequate cause shown in a proper proceeding, * * * it is our conclusion that the evidence shows the rate provided for [in the contract], when considered in relation to the other terms of the contract * * * and in the light of all the relevant attendant circumstances and conditions, to be lawful,—because not unjust, unreasonable, or unduly discriminatory—and therefore that it should be continued in effect" (R. 471). They also reject the majority's reliance upon the hypothetical anticipated rate of return to justify the proposed increase, asserting that the Commission should utilize the incremental cost test, which was the method actually used by PG&E in Exhibits 44 and 45, on the basis of which the P-31 rate was finally offered, in determining what rate of return was foreseen by PG&E when the contract was entered into (R. 472-474).

The Decision Below

On review the Court of Appeals for the District of Columbia Circuit reversed the Commission's Order on the ground that under the Power Act the contract is valid and binding between the parties and may only be set aside by the Commission itself after a hearing and finding under Section 206(a) that the contract is injurious to the public interest (R. 478-482). While in its original opinion the Court directed that the case be remanded either for dismissal of the pending proceeding or for further proceedings under Section 206(a), the Court later modified its order on motion of Sierra so as to direct the Commission to dismiss the pending proceeding, without prejudice to the initiation of a new proceeding under Section 206(a) (R. 495).

There Are No Substantial Differences Between the Instant Case and the *Mobile* Case

In substance, there is no material difference between the issues presented in this case and those being presented to this Court in *United Gas Pipe Line Company v. Mobile Gas Service Corporation and Federal Power Commission,* and *Federal Power Commission v. Mobile Gas Service Corporation,* Nos. 17 and 31, this Term, hereinafter referred to as the "*Mobile* case" or "Mobile". Although that proceeding arose under the Natural Gas Act, and the present under the Federal Power Act, the arguments there presented are equally applicable to the Federal Power Act, for it is conceded by all parties that the two Acts are in all essential respects substantially identical.

The only differences between the two Acts are: (1) that under Section 4(e) of the Gas Act the Commission is forbidden to suspend a proposed change of rate for the

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sale of gas for resale for industrial use only, whereas there is no comparable provision in Section 206(a) of the Power Act[7]; (2) that a natural gas company is expressly excluded from the list of parties authorized to bring a proceeding to review an existing rate under Section 5(a) of the Gas Act, whereas Section 206(a) of the Power Act merely provides that such a proceeding may be brought "on complaint," without specifying by whom such a complaint may be filed, and (3) that the Gas Act prohibits the Commission from ordering an increase in rates under Section 5(a) except in accordance with a proposed new rate filed by the company, whereas there is no such prohibition in Section 206(a) of the Power Act. We submit that none of these differences could support a determination that while the Gas Act may outlaw rate contracts, the Power Act does not, or vice-versa. Nor do petitioners make any such contention.

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[7] Petitioners argue that the existence of this provision may have unduly influenced the Court of Appeals for the Third Circuit in reversing the Commission in the *Mobile* case, because of the evident inequity of compelling Mobile to pay at rates in excess of the contract rate without any possibility of suspension, particularly where, as they contend, such payment cannot be refunded. As we have pointed out in the *Mobile* brief at pages 61 and 62, there is no substance to petitioners' contention that under the Gas Act, such overpayments cannot be refunded. Petitioners' concern for the equities ignores the fact that Sierra has been forced to pay over $800,000 in excess of the rate provided in its contract during the two years that have elapsed since the increase went into effect, even after a five months' suspension. Thus the procedure ordered by the Commission would seem equally inequitable in either case. But in any event, as petitioners concede, this circumstance was by no means determinative of the Third Circuit's decision in the *Mobile* case.

There is also a procedural difference: The Commission denied Mobile's petition asking that the filing be rejected and dismissed Mobile's proceeding, whereas in the present case, although the Commission denied Sierra's similar petition asking that PG&E's filing be rejected, it did so without prejudice to Sierra's right to present its contentions

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at the hearing which it ordered. However, after the hearing, the Commission in its Order again rejected Sierra's contention that its contract rate could not be changed without a finding of unreasonableness, and held that the proposed new rate, being not unreasonable, was lawful. Thus the issue as to the right of a company to increase a contract rate by the mere filing of a proposed increase is squarely presented in both cases.

PG&E also contends that the Commission in fact made a finding of unreasonableness in the order here under review. While we deny that such a finding was made, we think it is apparent from the record that even if it had been made it would not validate the Commission's order and that on the record it would have to be set aside because the record discloses that the contract rate itself is reasonable. (See Point III, *infra.*) There is also a dispute between the parties as to the effect to be given to the evidence in the record. We contend that it shows that the Commission acted arbitrarily and improperly in permitting the abrogation of the contract, quite apart from the legal question as to the contract's validity under the Act. (See Point V, *infra.*)

But regardless of the procedural and factual questions which are raised by this record, the basic legal question as to the validity of the contract is still determinative. If the contract is valid and binding until and unless found unreasonable by the Commission, the decision below must be affirmed. It is only if the Court should hold that contract do not survive the passage of the Act that the question of whether or not the Commission's order must be reversed as an abuse of administrative discretion need be reached. As the question of the validity of the contract is fully argued in the brief submitted on behalf of *Mobile,* the Court is respectfully referred to the arguments there set forth, on that issue.

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Summary of Argument

1. Rate contracts in the electric industry are subject to the paramount power of the Government to abrogate or modify them when the public interest so requires, just as are any other private contracts. This power may be exercised either directly by the Legislature as in the Interstate Commerce Act, or the Legislature may delegate the power to an administrative body to be exercised in accordance with prescribed standards. It is clear from the language of the Power Act, especially when compared with the language of the Interstate Commerce Act, that the former expressly recognizes contracts and delegates the power to abrogate them to the Federal Power Commission after a hearing and finding under Section 206(a) that the public interest so requires.

(a) The reason for this difference between the two Acts is that contracts are not necessary in the railroad industry, whereas contracts to sell electricity at special low rates for a term of years are necessary in the electric industry where substantial investments are frequently necessary, in order to enable a utility to meet competition and protect its investment. This is well illustrated by the record in this case. When the Power Act is read in the light of this factual background, it is apparent why the right to enter into such contracts is expressly preserved in the Act, subject to the right of the Commission to abrogate or modify them when the public interest so requires.

2. Since Congress delegated to the Federal Power Commission the power to abrogate or modify rate contracts after a hearing and finding under Section 206(a) that the public interest so requires, such contracts cannot be modified or abrogated in any other way without the consent of the parties. They cannot be changed, as petitioners con- [20] tend, by the filing by a utility of its proposed new rate under Section 205(d). That section merely prohibits any utility from making a change in an existing contract without notice to the public and to the Commission and is no more than a requirement that public notice be given before any change agreed to by the parties may become effective. Its purpose is to avoid secret rates, not to grant to an electric utility the extraordinary power to change its own contracts unilaterally.

Section 205(e) is intended only for the purpose of investigating the reasonableness of a proposed new rate. Since more than one rate can be reasonable for a given service, if a contract rate could be modified in a proceeding under 205(e), the contract could be modified solely upon a finding that the new rate was reasonable, even though the contract rate, which would not be in issue, might also be reasonable.

(a) Accordingly, the Court below correctly held that the Commission was in error in permitting the contract rate to be increased in a proceeding initiated by PG&E under Section 205, and was also correct in amending its decision to require that the pending 205 proceeding be dismissed before any further steps are taken under Section 206(a). If the Commission were permitted now to make a finding in the present proceeding that the contract rate is unreasonable, the result might be to abrogate the contract retroactively and validate the rate increase filed under Section 205. The right of the Commission to fix new rates after finding an existing rate unreasonable under Section 206(a) is prospective only. It cannot now, by finding the contract rate unreasonable under Section 206(a), validate a rate which was filed under Section 205 on February 2, 1953, and which has been in effect since September 26, 1953.

(b) PG&E's contention that there is no difference in substance between a proceeding under 205 and a proceeding under 206 is based on the erroneous assertion that the contract rate and the proposed new rate could not both be reasonable. PG&E bases this contention on the further erroneous assertion that the Commission does not sit to review rates, but solely to fix rates, and that therefore all rates are fixed by the Commission and that "if the Commission finds a rate to be reasonable, a materially different rate is necessarily unreasonable". This is a complete distortion of the provisions of the Act. It is the company and not the Commission which fixes rates in the first instance. The primary duty of the Commission is solely to review rates or changes in rates fixed or proposed by a company. It is only when those rates are found to be unreasonable that the Commission has any power to fix rates itself. Whether or not a rate is reasonable may depend upon whether it is proposed by the company or whether it is imposed upon a company by the Commission. A particular rate when proposed by a company might not be unreasonable, even though the identical rate if imposed upon the company by the Commission would be unreasonable. For example, in the present case the Commission approved a rate producing a return of only 4.75% on the express ground that PG&E was willing to accept that rate. If the Commission had attempted to impose the same rate on PG&E without its consent, it would have been set aside as confiscatory. Thus it is plain that more than one rate may be "reasonable". Any rate proposed by a company which is neither exorbitant, "unduly discriminatory or preferential", must be approved by the Commission on review, even though the same rate might be unreasonable if imposed by the Commission without the company's consent. It follows that if a contract rate could be changed in a Section 205 pro- [22] ceeding, it could be set aside if the new rate were reasonable, even though the contract rate itself were equally reasonable.

3. PG&E seeks to justify the Commission's order on the ground that the Commission stated that if a finding of unreasonableness were necessary it would find that the contract rate "is unreasonably low and therefore unlawful", and that no rate would be reasonable "that would produce a return of substantially less than the 4.75%

resulting from the proposed rate, *which is the minimum PG&E is willing to accept*" (R. 464). (Emphasis supplied.)

(a) This was not the formal finding of unreasonableness required by the Act. As the court below and the dissenting Commissioners correctly point out, the Commission did not make any finding of unreasonableness.

(b) Even if the Commission's language could be construed as a finding of unreasonableness, it would not support the Commission's order, for that order by its terms validates retroactively the new rate which had become effective in September 1953, nearly nine months before the alleged "finding of unreasonableness". The right of the Commission to fix new rates after a finding that existing rates are unreasonable is prospective only.

(c) In any event, even if the Commission's language could be construed as a formal finding under Section 206(a), it would have to be set aside as erroneous both in law and in fact. (1) The mere fact that a contract is unprofitable and that a company's stockholders may be losing money under it is no ground for setting it aside. The power to abrogate private contracts may be exercised only when the public interest so requires. It is clear from the Commission's own order and from the statements made before the Commission by Commission Staff coun-

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sel, as well as from the record itself, that the contract rate here in issue is just as reasonable as the proposed new rate which the Commission has approved: it is neither preferential nor discriminatory and imposes no additional burden on PG&E's other customers. Any loss of revenue is borne solely by PG&E's stockholders. Nor is it contended that the low rate is so burdensome as to interfere with PG&E's ability to fulfill its public utility obligations. (2) The Commission was correct in relying on PG&E's "willingness to accept" a rate producing less than a fully compensatory return on its investment as justification for holding such a rate to be reasonable. The Commission itself could not have imposed a less than compensatory rate on PG&E without its consent. But the Commission was in error as a matter of *fact* when it asserted that the proposed new rate was "the minimum PG&E is willing to accept". In 1948, in entering into the contract here in issue, PG&E solemnly expressed its willingness to accept the contract rate for the duration of the contract. Thus the contract rate is "the minimum PG&E is willing to accept" and as it is not injurious to the public interest it is just as reasonable as the rate approved by the Commission. Hence the Commission may not set it aside. Indeed, for the very reasons advanced by the Commission in support of its approval of the proposed new rate, if PG&E were now filing the 1948 contract, it would have to be accepted by the Commission.

4. The record in this case makes it quite clear that the existence of private rate contracts in no way frustrates or otherwise interferes with the proper regulation of rates for electric power by a duly authorized regulatory agency.

5. Quite apart from the legal questions here involved, it was an abuse of administrative discretion for the Commission to permit PG&E to increase its rates in violation

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of its contract. It is clear from the record that the public interest was in no wise adversely affected by the contract rates. The sole purpose and effect of the increase is to benefit PG&E's stockholders at the expense of consumers in Nevada. Moreover, the arguments and "findings" advanced by the Commission in its order, in an effort to justify its approval of this increase, are so arbitrary, capricious, unreasonable and so flagrantly disregard the facts in the record as established by PG&E's own witnesses and documents obtained from PG&E's own files, that, regardless of the question of law involved, the order must be set aside.

Argument

I

Private rate contracts are recognized by the Federal Power Act and are valid and binding as between the parties until and unless set aside by the Federal Power Commission after a hearing and finding under Section 206(a) that they are unreasonable.

It is plain from the language of the Federal Power Act, particularly when contrasted with the language of the Interstate Commerce Act, which outlawed contracts, that it expressly recognizes the existence of private rate contracts. But this does not mean that they are beyond the regulatory powers of the Commission. In Section 206(a) of the Power Act, Congress expressly delegated to the Federal Power Commission the power and duty to abrogate private rate contracts whenever the Commission shall find after a hearing that such contracts are "unjust, unreasonable, unduly discriminatory or preferential."

As we point out in the *Mobile* brief, the reason for this distinction between the two acts is that while rate contracts are not necessary in the railroad industry, they are necessary in the gas industry. An examination of the record herein will show that binding contracts for the sale of electric power are equally necessary in the electric industry.

A

PG&E has repeatedly requested and obtained permission from the California Commission to enter into contracts at special reduced rates for a fixed term of years in order to meet competition.

The Court will recall that while very little legislative history under the Gas Act was found dealing with the question here at issue, petitioner United itself in that case had testified before the Commission that contracts for the sale of gas for resale for industrial use only were essential to a proper growth and development of the gas industry. While there is even less legislative history bearing on this issue under the Federal Power Act, the record in the present case shows that petitioner PG&E has repeatedly presented evidence before the Public Utilities Commission of the State of California, formerly known as the Railroad Commission, that contracts for the sale of electricity for resale at special low rates for a fixed term of years are essential in order to enable PG&E to meet competition both in its sales to large industrial consumers and in its sales for resale to local distributing companies.

At pages 151 to 165 of the transcript of record herein, there will be found excerpts from the testimony of Mr. B. B. Beckett, PG&E's Chief Rate Engineer, at a hearing

held in 1945 before the California Commission at which PG&E sought and obtained the State Commission's approval of its P-31 rate schedule, the same rate that was subsequently embodied in the contract here in issue (R. 154).

Mr. Beckett begins his testimony by pointing out that the proposed schedule is a revision downward of an earlier schedule known as P-30 which had been approved by the Commission in 1936. In describing that schedule, he said:

> "* * * P-30 would mean a reduction to large industrial customers then being served on P-5 [a higher rate], providing they would sign contracts agreeing to take service for periods of 5 years. The purpose was to meet competition of Diesel engines and other isolated electric generating plants and to promote additional business.
>
> "* * * I do know of my general knowledge and studies that it is better to hold any business at a somewhat reduced rate than not to hold it." (R. 152)

Mr. Beckett then goes into great detail to demonstrate the advantages to PG&E of being able to offer contracts at special low rates in order to meet competition and hold existing business, provided the "incremental revenue is more than the incremental cost" of rendering the service (R. 158), or, putting it another way, "if the result does not produce such a low revenue and low rate that it would not meet the costs which might be eliminated if the business were lost" (R. 154). He concedes that these rates will not return the "full allocated average cost of rendering the service * * * if by 'allocated costs' you mean what is generally meant by that term, that is, taking the system business as a whole and proceeding to allocate to different classes as is usually done by the method which is usually used in rate making" (R. 155). He then shows in some detail that the company would receive little salvage value on its investment if it lost existing business in which it had a substantial investment, and that it is to the advantage of the company to hold such business at some return, computed on an "incremental cost" basis rather than to lose the business (R. 158). He also makes it quite clear that these low rates should not be permitted unless the customer agrees to enter into a contract for a period of at least five years, and adds "It should preferably be longer than 5 years" (R. 154). His testimony and that of other witnesses called by PG&E at that hearing are summarized in the decision of the California Commission approving the schedule as follows:

> "At the hearing, witnesses for Pacific explained the circumstances which had given rise to the proposed rate reductions. It was pointed out that the United States Department of the Interior, Bureau of Reclamation, has publicly offered a schedule of rates for the sale of electric energy generated at its Shasta hydroelectric plant, * * *. Such resale rate offered by the Bureau was substantially lower than Pacific's presently effective resale rates for similar services [under the existing P-30 schedule]." (R. 147)

At page 148, the Commission continues:

> "Testimony given by witnesses for Pacific, as well as by the Commission's staff, indicates that Schedule P-31 will not return all the costs which properly should be included if a full compensatory rate were being established.
>
> * * * * * * *
>
> "It justifies the offer of reduced rates to resale customers primarily in order to safeguard existing business * * *.

> "It is clear that Pacific has the legal right to reduce [28] its rates in order to meet in good faith the // competitive rates being offered by the Bureau of Reclamation. This right has frequently been recognized by the Commission. Our precedents to such effect, as well as the judicial authorities, were cited in the case of Modesto Irrig. Dist. v. Pacific Gas & E. Co. * * * However, as the Commission has clearly stated in that decision, as well as in many others, the loss, if any, incurred by a utility offering a competitively reduced rate, must be borne by the utility itself and will not be permitted to burden its other customers." (R. 149)

That these special low rate contracts were intended to be binding for the duration of their terms is also apparent from Mr. Beckett's testimony under cross-examination by the California Commission's Staff Counsel, Mr. Wehe:

> "Q. * * * Then, from the customer's viewpoint it would probably follow that the sole reason that that customer would sign up for a 5-year contract would be because of the opportunity to receive the lower rate under P-31 or P-30, isn't that right? A. Well, I would imagine that that would be—might be his reason right now, but I would think that he also might desire stabilization, *assurance that he will have service at this lower rate for a period of at least 5 years."* (Italics supplied.) (R. 162-163)

That PG&E itself, at least as recently as 1950, believed that these contracts should be binding in accordance with their terms, is apparent from the position which it took in that year in a proceeding before the California Commission when seeking an over-all rate increase of 6% on its existing rates. In that proceeding, PG&E expressly requested that some twenty purchasers for resale which had P-31 contracts, including the contract with Sierra here in issue, should be excluded from the proposed increase. At the hearing on this application, Mr. J. S. Moulton, Vice

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President and Executive Engineer of PG&E, testified in support of the application. After describing the existing contracts entered into under P-31, Mr. Moulton said:

> "Because of the competitive conditions under which these contracts were negotiated, which reasons were recognized by the Commission in authorizing them, we believe that the contracts with all these cities and with the Plumas-Sierra Cooperative should be exempted from the requested increase" (R. 270).

Finally, in summing up PG&E's contentions in support of the exemption of these special contract customers, Mr. DuVal, counsel for PG&E at that proceeding said "I think anybody would agree that we would be accused of double dealing repudiation" if PG&E had sought to increase these contracts (R. 278). The Commission, after reviewing the testimony, approved the exemption with the following proviso:

> "In authorizing Pacific [PG&E] to exempt certain resale customers from rate increases, we recognize the right of a utility to meet competition. In approving such special contract rates in the past, we indicated that, if the revenue therefrom should fall below the cost of service, the loss would not be permitted to burden the other classes of customers." (R. 293)

And as we have seen (pp. 9, 10, *supra*), in 1952 the Commission refused to permit PG&E to repudiate these contracts.

Thus there can be no doubt that contracts are both customary and necessary in the electric industry, in order to enable a utility company to meet competition, such for example as the threat of the construction of individual

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steam plants by its large industrial customers or local distributing companies, or an offer of cheaper power from U. S. Government installations such as that at Shasta Dam.

When the Act is read in the light of this factual background, we think it is apparent, for the reasons set forth in the *Mobile* brief, that rate contracts are not outlawed by the Act, but remain as valid and binding agreements until and unless set aside in accordance with the procedure prescribed in Section 206(a).

II

PG&E's attempt to increase the contract rate by filing a schedule under Section 205 over Sierra's objection, being unauthorized by the Act, must be rejected by the Commission before any proceedings can be taken under Section 206(a).

As we have indicated in the *Mobile* brief, since Congress has delegated its power to abrogate contracts to the Commission to be exercised only after a hearing and finding of unreasonableness under 206(a), a contract rate cannot be abrogated in any other manner. The language of Section 205(d), upon which petitioners place their entire reliance, that "No change shall be made by any public utility in any such [filed] rate * * * or contract * * * except after thirty days' notice to the Commission and to the public", clearly does not constitute an affirmative grant of authority to a public utility to abrogate its own contract unilaterally. The plain purpose of that provision is to prevent parties to rate contracts from changing rates by secret agreement without notice to the Commission and to the public.

A

It follows from the foregoing that the Court below was correct in amending its opinion so as to direct the Commission to dismiss the pending proceeding, which had been institued under Section 205, without prejudice to the initiation of a new proceeding under Section 206(a).

In its opinion as originally published, the Court of Appeals remanded the case to the Commission with instructions "either to dismiss the proceeding or for further proceedings under Section 206(a)" (R. 483-484). The present respondent thereupon filed a motion asking the Court to amend its decision so as to provide that the pending proceedings be dismissed, "without prejudice to the initiation of a new proceeding under Section 206(a)" (R. 485). This motion was based on the proposition that, since the pending proceeding was commenced by the filing of a new schedule under Section 205, it was necessary first to dismiss that proceeding. Otherwise the contract might be found unreasonable nunc pro tunc as of the date of the commencement of the pending proceeding, which is what the Commission had stated it would do if such a finding were necessary. Such action would be contrary to the decision of the Court below on the merits that the contract was valid and binding until and unless found unreasonable by the Commission after a hearing under Section 206(a). The motion was granted and the opinion amended accordingly.

Petitioners now argue that it would be inequitable to dismiss the present proceeding because this would mean that even though the Commission in a new proceeding under 206(a) should find the existing rate unreasonable, it could only fix a *prospective* rate to be charged in the future. This would mean that the rates collected in violation of a legal and valid contract for a period of over two years would have to be returned to Sierra. In this

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conclusion petitioners are, of course, quite correct. It would require a reversal of the entire basis of the lower court's decision to permit a rate previously filed under Section 205 to be retroactively validated by a subsequent finding that the contract was unreasonable.

The Solicitor General complains that this will subject PG&E to a "greater burden" (C. Br. p. 21).[8] PG&E goes so far as to assert that *"in equity and good conscience"* it "should be entitled to retain the increase since the unreasonableness will relate to the entire period during which the increase was collected" (Italics added) (P. Br. p. 37).[9] This is strange language for a company which has deliberately repudiated its solemn obligations. Surely "equity and good conscience" do not require that PG&E should be permitted to retain increased rates illegally collected in violation of a contract entered into after more than a year of negotiations, before any finding has been made that the public interest requires that the contract be abrogated.

Both petitioners are evidently laboring under the delusion that the power to abrogate contracts exists for the benefit of PG&E and that "equity and good conscience" requires that PG&E be promptly relieved of its contract obligations whenever it seeks such relief. They do not seem to realize that it is only the *public* interest, and not the interest of PG&E's stockholders, that gives rise to the power to abrogate contracts. And certainly the public interest will not be adversely affected by the fact that PG&E is compelled to live up to its contract until it has been set aside in accordance with law.[10]

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[8] Brief of Federal Power Commission in this case.

[9] Brief of Pacific Gas and Electric Company in this case.

B

PG&E's contention that there is no difference of substance between a proceeding under 205 and a proceeding under 206 is untenable.

The reason assigned by the Court below for its decision that a contract rate could not be changed in a proceeding under 205 was that the only issue in such a proceeding was the reasonableness of the proposed new rate, and that the reasonableness of the existing rate could only be passed on in a proceeding under Section 206(a). As expressly pointed out by the Court below, *both* rates might be reasonable, so that in a 205 proceeding an increase might be allowed even though the contract rate would have been found reasonable in a proceeding under 206(a). Thus, if a contract rate could be changed in a 205 proceeding, the contract might be abrogated even though it was perfectly reasonable.

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[10] PG&E and the Commission also both complain that it would be an undue burden on the parties as well as on the Commission to compel the Commission to begin all over again with a new proceeding and the taking of new testimony, under 206(a). With this contention we are in sympathy. In making our motion to amend the opinion in the Court below we had assumed that in a new proceeding initiated by the Commission under 206(a) the Commission could act on the existing record, with such additional evidence as any party might desire to add. If there is any doubt as to this, we would have no objection to the order being further amended so as to provide that the case should be remanded to the Commission "with instructions to dismiss the proceeding under 205 without prejudice to the continuation of further proceedings under Section 206(a)" instead of expressly requiring the "initiation of a new proceeding under Section 206(a)", as it does now. But there can be no doubt that unless the 1948 rate contract is regarded as a complete nullity, the Section 205 proceeding must be dismissed before any further steps can be taken under Section 206(a).

PG&E asserts that "This is a surprising misunderstanding of the Commission's functions and duty in rate cases" (P. Br. 19).

According to PG&E there is no difference of substance between a proceeding under 205(e) and one under 206(a): "The end result, the just and reasonable rate, must be the same under either procedure" (P. Br. 17). The reason for this, says PG&E, is that:

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> "If the Commission finds a rate to be reasonable a materially different rate is necessarily unreasonable" (P. Br. p. 8).

This they argue, is because the Commission's primary duty is not to review rates, but to *fix* "the reasonable rate":

> "Under either Section 205(e) or Section 206(a) the Commission does not sit to review rate fixing activities of others; it sits to exercise its power to determine the just and unreasonable rate" (P. Br. p. 23).

It is PG&E, and not the Court below, which by these assertions shows a "surprising misunderstanding of the Commission's functions and duty." To take the last contention first: It is plain from a mere reading of the two sections that the exact reverse is true: Under both sections the Commission in the first instance sits solely "to review rate fixing activities" of the Company, and not "to determine the just and reasonable rate." Under Section 205 it may review a change of rates proposed by a company. If it determines to hold a hearing as to the reasonableness of the new rate, it may after such hearing "make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective."

The nature of the "orders" which "would be proper in a proceeding initiated after it [the rate] had become effective" is specified in Section 206(a):

> "Whenever the Commission, after a hearing * * * shall find that any rate * * * or contract affecting such rate * * * is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate * * * or contract to be thereafter observed and in force, and shall fix the same by order."

Thus, it is apparent from the very terms of the Act that the Commission's primary duty under both sections is precisely what PG&E has said it was not: "to review the rate fixing activities of others". The Commission has no power to fix rates itself until it has found upon such review that the rates fixed by others are "unjust, unreasonable, unduly discriminatory or preferential."

In asserting that the Court below was in error in thinking that the proposed rate and the contract rate might both be reasonable, PG&E overlooks the obvious fact that the test of reasonableness to be applied by the Commission when reviewing an existing filed rate or a change in rates proposed by a company is quite different from that to be applied by a Court when reviewing a rate fixed by the Commission itself. It is, of course, well established that when the Commission imposes a rate upon a company to which the company has not agreed, that rate must be one which will produce a "fair return" on the company's investment. And, as PG&E correctly observes, this "*statutory* reasonableness is an area, rather than a pinpoint * * * It is the Commission's duty * * * to pin-point the reasonable rate" within that area (P. Br. p. 19) and the Court's duty, on review, to fix the outer boundaries of the area. If the Commission fixes a rate within that area, it must be accepted by a court. If it fixes a rate which produces less than a "fair return," it will be set aside by the Court as confiscatory.

But that principle applies only when the Commission itself is fixing a rate because it has found the Company sponsored rate unreasonable. It is equally apparent from the language of the Act itself that where the Commission is reviewing an existing rate or change of rate proposed

by a company, it is not "pin-pointing" the reasonable rate. The "pin-pointing" has been done by the company itself. The Commission's duty in reviewing that rate is the same as that of a court sitting to review a rate fixed by the Commission. If the rate proposed by the company is within the area or "zone of reason" applicable to such a rate—*i.e.*, in the words of the Act, if it is not "unjust, unreasonable, unduly discriminatory or preferential"—the Commission has no more authority of power to reject the rate than would a court if the rate fixed by the Commission were within the zone within which the Commission may fix rates. Thus any rate proposed by a company which is neither exorbitant or unduly discriminatory or preferential must be approved by the Commission, and manifestly, several such rates might be selected by a company for its own legitimate business purposes, such as to meet competition and hold or attract business.

The correctness of this proposition is confirmed by the action taken by the Commission itself, as well as by the contentions advanced both by PG&E and by the Commission staff, in the proceedings here under review. The Court will recall that in the present case it was conceded that the proposed increase filed by PG&E would produce a rate of return of only 4.75% on PG&E's investment, whereas it was also conceded that a return of 5.5% would be a reasonable return on that investment for this type of business. Yet the Commission, having found that the proposed rate was neither "unduly discriminatory or preferential"—and of course it concededly was not exorbitant—had no alternative (absent the contract) but to find, as it did, that "the proposed rate is not unreasonable and is lawful" (R. 457, 466).

The principle involved was well stated by Commission staff counsel on the oral argument before the Commission:

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> "I know of nothing in the cases so far as the law goes, and I know of nothing in policy, which says that this Commission should second-guess a company on differences in rates as long as both of them are reasonable and don't produce an unreasonable rate of return." (Official Stenographer's Report p. 1446, In The Matter of Pacific Gas and Electric Company Docket, No. E-6482. Page 1446 of the Record before the Court of Appeals)

Thus, it is apparent that the Court below was quite correct when it pointed out that the contract rate and the proposed new rate might both be reasonable—or, to be precise, that neither might be "unreasonable".

It is also apparent that a rate proposed by a company might not be "unreasonable" when reviewed by the Commission, while the identical rate might be found unreasonable by a court if imposed by the Commission. For example, if the Commission had sought to impose a rate producing a return to PG&E of only 4.75% on its investment, when PG&E was concededly entitled to a return of 5.5%, a court would have to reject such a rate as confiscatory at the suit of PG&E. Yet, if there were no contract in existence here and PG&E had proposed its increased rate, the Commission would have had no choice but to approve it, despite its 4.75% rate of return, because it was proposed by the company and was found by the Commission to be neither unduly discriminatory nor preferential.

Thus a rate which would be "unreasonable" if imposed by the Commission might be perfectly "reasonable" if proposed by the company. There is no substance to PG&E's elaborate effort to demonstrate that the Court below displayed "a surprising misunderstanding of the Commission's functions and duty in rate cases" (P. Br. p. 19). The shoe is on the other foot. The construction of the Act by the Court below was in all respects correct.

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A new rate proposed by a utility under Section 205(d) may be perfectly reasonable, even though the existing contract rate may also be reasonable.

Hence, a contract rate can not legally be changed in a 205 proceeding, for in such a proceeding, it could be changed even though it were not unreasonable. It follows that the difference between a proceeding under Section 205(e) and one under 206(a) is one of substance, and that the dismissal of the pending proceeding commenced under the former section is a necessary prerequisite to any further proceedings which can be had under Section 206(a).

III

The fact that there has been a hearing in the present case does not help petitioners. The Commission did not make a finding that the contract was unreasonable, and even if it had, such a finding would not validate the Commission's order as a matter of law, and in any event would have to be rejected as unwarranted by the record.

Unlike *Mobile*, where the Commission denied Mobile's petition to reject United's filing and dismissed Mobile's proceeding, the Commission here, although it denied Sierra's petition to reject the filing, ordered a hearing under Section 205(e) into the reasonableness of PG&E's proposed higher rate and expressly reserved Sierra's right to maintain its contentions in that hearing.

At the close of the hearings the Commission found that PG&E's increased rate was not unreasonable and ordered that it become effective. That, of course, was not the finding that the contract rate was unreasonable which is required by the Act. Accordingly, the Commission's order was unlawful and the court below properly set it aside.

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But petitioners point out that, after rejecting Sierra's contention that the filing was illegal because it was in violation of the contract, the Commission continued:

> "However, we may point out that if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful. For none of the evidence

in this record warrants a finding that any rate would be reasonable that would produce a return of substantially less than the 4.75% resulting from the proposed rate, which is the minimum PG&E is willing to accept" (R. 464).

A

The Commission did not make a finding that the contract was "unreasonable."

PG&E argues earnestly that the above quoted statement constitutes, or at least should be construed by the Court as constituting, a formal finding of unreasonableness, if such a finding is required. We think the dissenting Commissioners were correct when, after quoting the foregoing language, they pointed out that "no such finding is made. Rather, it seems to have been carefully avoided" (R. 475). And this was the view taken by the Court below.

B

Even if the Commission's language could be construed as a finding of unreasonableness, it would not support the Commission's order.

PG&E further contends that this alleged "finding" supports the Commission's order, even though entered in a

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205 proceeding, because there is no difference of substance between a proceeding under Section 205 and one under 206(a). As we have shown in the preceding point, that contention is untenable. For the reasons there set forth, even if the Commission had in fact made an affirmative finding of unreasonableness as required by Section 206(a) in its order entered on June 17, 1954, that order would still have to be set aside. The Commission can not by

such a finding retroactively validate a rate increase filed under Section 205 which had been in effect since September of 1953, nine months before the finding was made. The right of the Commission to fix a new rate under Section 206(a) after a finding that the contract is unreasonable is prospective only. Until such a finding has been made, the contract rate is the only legal rate. As the Commission's order has the effect of validating the increase as of its effective date in September 1953, the order must be set aside and the filing rejected, before any proceedings can be undertaken under 206(a).

C

In any event, the Commission's purported "finding" is erroneous both as a matter of law and as a matter of fact.

Even if the Commission had made the finding which PG&E contends it made, that finding would have to be rejected by the Court because it would be directly contradicted by the evidence in the record. As just indicated, the only basis assigned by the Commission for such a finding is that the contract rate is "unreasonably low and therefore unlawful" and that it is "the minimum PG&E is willing to accept." The law is quite clear that the mere fact that a contract rate is low is not sufficient ground to set aside the contract and it is equally clear as a matter

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of fact that when PG&E entered into the present contract, it expressed its willingness to accept the contract rate for fifteen years.

(1) *As a matter of law, a contract may not be set aside merely because it is unprofitable when, as here, it is not injurious to the public interest.*

The principle that a contract rate may not be set aside merely because it is unprofitable was enunciated by this Court in *Arkansas Natural Gas Co. v. Railroad Comm.*, 261 U.S. 379 (1923), at pp. 382-3, in the following language:

> "The question whether, in the absence of the statute—it being made to appear that the stipulated consideration was grossly inadequate—the commission, under the circumstances disclosed by the record, would have been under a duty to fix gate rates in contravention of the contracts, may be put aside with brief consideration. While a State may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts (*Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372, 375; *Producers Transportation Co. v. Railroad Comm.*, 251 U. S. 228, 232) there is, quite clearly, no principle which imposes an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed, the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist *per se*. It is the intervention of the public interest which justifies and at the same time conditions its exercise." (261 U. S. 379, 382-3)

This decision was closely followed by a very pertinent case in the Kansas Supreme Court: *Railroad & Light Co. v. Court of Industrial Relations*, 113 Kan. 217, 214 Pac.

797 (1923). In that case, the Kansas Commission, adopting the procedure prescribed by the U. S. Supreme Court in *Wichita Railroad v. Pub. Util. Comm.,* 260 U.S. 48 (1922), had held hearings as to the reasonableness of certain contract rates, and set them aside on the ground that they were unreasonably low. The Kansas Supreme Court reversed the Commission on the ground that the finding of unreasonableness was not supported by the evidence because there was no proof that the low rates were prejudicial to the public interest. In the course of its opinion the Court defined the circumstances under which a contract rate could be set aside as follows:

> "If, for instance, continued performance of the contracts in question should bear so heavily on the power company that its general revenues would be depleted to the extent that recoupment would have to be made at the expense of the other customers, or would otherwise be reflected adversely in its rates or service to that portion of the public served by the power company, the contracts could and should be abrogated under the police power; but if continued performance of the contracts would only affect the net profits or dividends on that portion of the power company's property devoted to performance of the contracts, then the public interest would not be affected, and there would be no occasion or excuse for the intrusion of the state's police power. (*Kaul v. Telephone Co.,* 95 Kan. 1, 147 Pac. 1130; *Re Rockingham County Light & P. Co.,* P.U.R. 1917 F, 24)" (113 Kan. 229, 214 Pac. 803).

In *Columbus R. Power & Light Company v. Columbus,* 249 U.S. 399 (1919), a street car company was under a clear contract obligation to furnish service at specified fares. There was no evidence that the company could not carry out its contract obligations, nor even that it would not make some profit, however small, in doing so. This Court held that under these circumstances that company must abide by its contract: "But equity does not relieve from hard bargains simply because they are such" (249 U.S. 399, 414).

In applying these principles to the record in the case at bar, it becomes immediately apparent that the contract in question is not against the public interest.

In support of its determination that the rate producing a 4.75% return on this business is "not unreasonable and [therefore] lawful," the Commission points out that the company is willing to accept this low rate of return "Notwithstanding the stipulated fact that 5½% is generally a reasonable rate of return on the electric utility business of PG&E" (R. 464). The Commission continues:

> "It is apparent that PG&E regards the deficiency of .75 of a percentage point as warranted in order to attract and retain this particular business in the face of the alternatives that may have been available to Sierra. With the investment which PG&E has made and has undertaken to make in special facilities on which it would earn no return at all if it lost this particular business, it would require evidence of a kind not presented in this record to warrant a finding that the 4.75% rate of return it is willing to accept from this sale is unreasonably low. Not only is there no such evidence but it affirmatively appears that this deficiency is not offset by any excess return from other sales subject to our jurisdiction and that the California Commission has ruled that such deficiences may not be offset by excesses from other PG&E sales which are

> subject to its regulatory jurisdiction. This, and the fact that no undue discrimination or preference results

> from the deficiency, as we have // already seen, makes clear that the proposed rate is not unreasonable and is lawful" (R. 466).

That these considerations are equally applicable to the contract rate is apparent from the following colloquy between a member of the Commission and Commission Staff counsel at the hearing preceding the issuance of the order:

> "Mr. Wahrenbrock: Well, if PG&E is willing to serve one customer at less than a fair return on that business and to earn only a fair return on all of its other customers, its seems to me that the other customers are not the victims of an undue discrimination because they're getting all that the law entitles them to in any event. They're paying only a reasonable return on the business to them.
>
> "Commissioner Smith: Isn't that the situation here?
>
> "Mr. Wahrenbrock: That seems to me to be the situation that will result from the new rate here, yes.
>
> "Commissioner Smith: It seems to be the siutation that has existed all along, as I understand the record.
>
> "Mr. Wahrenbrock: That is right" (Official Stenographer's Report pp. 1447-1448, *In The Matter of Pacific Gas and Electric Company,* Docket No. E-6482. Pp. 1447-1448 of the Record before the Court of Appeals).

And again in his brief before the Commission, Commission Staff counsel said:

> "The only question would seem to be whether, in determining what is a fair return for this business, P.G.&E. should be held bound by the representations

and agreement it made in 1948 as to a satisfactory return for the term of its agreement. Under the rate regulation practices heretofore followed by the California Commission and this Commission, no other cus-

tomer of P.G.&E. will bear any greater // burden if P.G.&E. is held to its 1948 representations and the California Commission has held that it should be"[11] (Brief of Commission Staff pp. 33-34. In The Matter of Pacific Gas and Electric Company, Docket No. E-6482).

These statements seem to us to constitute a complete concession that the contract rate is not unreasonable.[12]

(2) *As a matter of fact the contract rate, and not the proposed new rate, is the "minimum PG&E is willing to accept."*

Absent the contract, the Commission is correct in basing its decision that a rate producing a return of only 4.75% was not unreasonable on the fact that PG&E is willing to accept the low rate of return. As we have shown above, the test of reasonableness of a rate proposed by a company is quite different from that applicable to a rate imposed by the Commission itself. The Commission could not have imposed a rate producing a return of substantially less than 5.5% without PG&E's consent. But with that consent, the lowest rate which the company is willing to accept must be approved by the Commission if it is not "unduly preferential or discriminatory."

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[11] In view of these concessions, it is somewhat surprising to find in the Brief submitted herein on behalf of the Commission and subscribed by the author of the foregoing, the twice repeated statement that the effect of the decision below is "to allocate the burden of increased costs among PG&E's customers according to the existence of contracts and the order in which contracts expire." (C. Br., pp. 13, 36)

[12] Commission Staff counsel sought to avoid this conclusion by arguing that if PG&E had entered into a large number of such contracts, its financial stability might be threatened. "The fact that only a very small percentage of its business is involved [in this contract] would not seem to alter the principle." This is not a question of "principle" but "fact." If this contract does not threaten PG&E's financial stability, as concededly it does not, it does not injuriously affect the public interest. If it did, or if PG&E had entered into so many that they would, they would all be set aside under 206(a) upon a finding that such were the facts.

[46]

But the Commission is in error in holding that the proposed new rate is "the minimum PG&E is willing to accept" (R. 464). The Commission ignores the fact that in 1948 PG&E solemnly expressed it willingness to accept the contract rate for a period of fifteen years. Thus the contract rate, and not the proposed new rate, is "the minimum PG&E is willing to accept." That is why that rate cannot now be disturbed.

Perhaps the simplest way of illustrating the error in the Commission's thinking on this subject is to point out that, on the very reasoning advanced by it in support of its approval of the 4.75% rate, if PG&E were now proposing to serve Sierra at the contract rate, which it is stipulated will produce a return of only 2.6% instead of 4.75%, the Commission would have to approve that rate. For, as we have seen, it is concededly neither preferential nor discriminatory and places no burden upon PG&E's other customers, and if proposed by PG&E (as it was in 1948, for a 15-year period) it would be "the minimum PG&E is willing to accept." It is the Commission's primary function to obtain for consumers the lowest reasonable non-discriminatory and non-preferential rate available. Whether a company offers to serve a customer at a rate producing a return of 4.75% or only 2.6% the rate which it proposes must be accepted by the Commission, provided it is neither discriminatory nor preferential. PG&E having agreed, for its own business reasons, to accept the lower rate for the duration of the contract, it remains the "lowest rate PG&E is willing to accept," and therefore the legal rate, unless and until it is found by the Commission that it has become "unduly discriminatory or preferential," or so

burdensome that its performance // will prevent PG&E from performing its duties to the public.[13]

We submit, therefore, that it is indisputable on this record that if the Commission had made a finding that the contract was unreasonable because it was too low and was lower than PG&E was willing to accept, that finding would have to be set aside as against the law and the facts. The contract rate is just as reasonable as the new rate authorized by the Commission. This is the very situation referred to by the court below: the contract rate and the proposed new rate are both reasonable.

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[13] It is, of course, not contended by any party hereto that the contract rate is so burdensome to PG&E that it will in any manner interfere with its ability to carry out its public utility functions. Indeed, the record shows that PG&E's management considers it more advantageous to serve a customer at even lower rates if necessary in order to meet competition. The Court will recall that in seeking general rate increases of its contract rates in 1952, PG&E expressly excluded its contract with the City of Redding, which is 10% lower than the rate in its contract with Sierra on the express ground that Redding, being located within a few miles of Shasta Dam, still enjoyed a strong bargaining position (R. 280-282).

IV

The existence of binding private rate contracts in no way interferes with the proper functioning of a rate regulatory agency.

Petitioners in both the present case and the *Mobile* case repeatedly assert that if rate contracts are held to be binding until and unless set aside by the Commission on a hearing and finding of unreaonableness, the Commission will be frustrated in the performance of its duties. We submit that the record in the present case presents a conclusive, practical refutation of such a contention.

As we have shown above (see pp. 4-9) PG&E has for many years entered into and observed binding contracts for the sale of power both under its P-30 rate schedule [48] approved by the California Commission in 1936 and under the P-31 schedule approved in 1945 and embodied in the present contract. At the time of the hearings before the Commission in 1950 and 1952 which we there discussed, there were at least twenty such contracts outstanding. These contracts have always been treated as binding by the California Commission, and until 1952 when PG&E thought it could safely repudiate them without losing the contract customers, they were also treated as binding by PG&E itself. It is also apparent that the California Commission found no difficulty whatever in performing its regulatory functions in such a manner as not to interfere with the continuing validity of these agreements.

In approving these contracts and insisting that they be observed, the Commission invariably saw to it that the burden of the contracts would fall solely on the company's stockholders and would not be passed on to PG&E's other customers. For example, the California Commission's Order of October 15, 1952 rejecting PG&E's attempt to increase its contract rates contained the following provision:

> "The revenues from these services will be computed at the new resale schedule for the purpose of determining applicant's over-all revenue requirements only, but the rates for such resale contract customers will not now be increased. By this method, no burden will be placed on the other classes of customers but any burden will fall on the stockholders' portion of the earnings until such time as the contracts may have been renegotiated and have been authorized by the Commission." (R. 285)

Thus the public interest was at all times protected.

An example of how a company which believes that an existing contract has become so low as to justify its

being relieved from the burden of the contract may obtain such relief is presented in the case of *Railroad & Light Co. v. Court of Industrial Relations,* 113 Kan. 217, 214 Pac. 797 (1923). That case closely followed the decision of this Court in *Wichita Railroad & Light Co. v. Pub. Util. Comm.,* 260 U.S. 48 (1922). The Court will recall that that was the case in which this Court held that under the Kansas statute a contract rate could not be set aside by a mere filing of a schedule of new rates. The following year the Railroad & Light Company, in filing a new schedule requesting general increases, profited by that decision and excepted those rates embodied in contracts, but noted the existence of the contracts in its application. The Kansas Commission thereupon held hearings as to the reasonableness of these contracts on its own motion, found them unreasonable, and set them aside.[14]

In other words, it is quite apparent that rates contracts have been considered valid by State Commissions for many years and that they have never furnished any serious obstacle to a regulatory Commission's performance of its functions. Moreover, as indicated in our brief in *Mobile*, pp. 56-61, there is no evidence that the Federal Power Commission had ever permitted a contract rate to be increased by the mere unilateral filing of a new schedule prior to its action in this case and in the *Mobile* case. On the contrary, the records of the Commission indicate that at least as recently as 1948, the Commission itself recognized the existence and validity of rate contracts.[15] Thus, there is no merit to the contention of the petitioners that the existence of rate contracts is incompatible with the administration of the regulatory scheme set forth in the Federal Power Act.

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[14] This action was later reversed by the Kansas Supreme Court on the ground that the only evidence of "unreasonableness" was that the contracts provided a low rate of return, and that there was no evidence that the public interest was adversely affected by them. (See p. 42, *supra.*)

[15] Since writing the brief in the *Mobile* case, our attention has been called to the case of *United Gas Pipe Line Co. v. Federal Power Commission*, 220 F.2d 706 (5th Cir. 1955) S.Ct. Docket No. 302, in which this Court denied United's petition for certiorari to the 5th Cir. on October 10, 1955. This case indicates that despite the position taken by them in the *Mobile* case, both United and the Federal Power Commission also still consider rate contracts to be valid and enforceable in the gas industry. In that case, United had entered into a contract with the approval of the Federal Power Commission to furnish gas to Mississippi River Fuel Corporation, the intervener, under a rather complicated rate schedule providing for two alternative rates depending upon the source of gas. A dispute arose as to the proper construction of this contract. Mississippi contended that United had been overcharging it and brought a proceeding before the Commission to compel United to refund the overcharges. United contended that under its construction of the contract its charges were correct. The Commission construed the contract in favor of Mississippi and ordered United to refund over $2,000,000 to Mississippi. On review the Court of Appeals, holding that the only issue in the case was the construction of the contract, sustained the construction placed upon it by the Commission. Thus it is appar-

V

Quite apart from the legal questions involved, it was an abuse of administrative discretion for the Commission to sanction PG&E's repudiation of its contract in the face of the undisputed evidence that it is not injurious to the public interest, and that the only effect of the repudiation is to benefit PG&E's stockholders. Moreover, the Commission's efforts to justify its action are arbitrary, capricious, unsupported by the evidence and contrary to the evidence.

As we have seen, the public interest is in no manner adversely affected by the contract here in issue. Concededly, any loss resulting from the low rate is borne ex-

[51]

clusively by PG&E's stockholders. Moreover, the ultimate beneficiaries of the low rate provided for in the contract are the consumers in the State of Nevada. It has always been our understanding that the primary function of the Commission was to obtain the lowest available rates for the consumers. Certainly it was not created in order to protect a utility company's stockholders from the burdens of an unprofitable contract, just because the threat of competition which made the contract advantageous when it was entered into has ceased to exist.

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ent that even at the present time both the Commission and United believe that under some circumstances rate contracts are as valid, binding and enforceable in accordance with their terms as any other contract. Why they take the opposite view in this and the *Mobile* cases, we are at a loss to understand.

It is too plain from the record to permit serious dispute that PG&E's management entered into this contract in 1948 after many months of negotiation, during which it sought to compel Sierra to accept a contract at substantially higher rates with an "escalator clause", thus permitting further automatic rate increases depending on increased cost of fuel. It was only after Sierra had flatly rejected such a proposal and when PG&E itself had been approached by the Bureau of Reclamation with a suggestion that it wheel Shasta power to Nevada for the Bureau's account, that PG&E's management finally acceded to Sierra's insistence upon a lower rate and offered the contract here in issue. (See *supra,* pp. 5-7). Moreover, it is also perfectly plain that it is only because the threat of competition from the Bureau of Reclamation no longer exists that PG&E is now attempting to repudiate that contract. This is apparent from PG&E's own testimony before the California Commission during the course of the 1952 hearings that it wished to increase all of its contract rates with the exception of its contract with the City of Redding where competitive conditions still exist (R. 281). Thus it is apparent that if the threat of Government power which induced PG&E's management to offer this contract in 1948 still existed, PG&E would undoubtedly be perfectly willing to carry out its contract.

[52]

We submit that the total lack of elementary business morality shown by PG&E in cynically repudiating its contract after that threat has been removed—and removed, as the record shows, by the action of PG&E itself in entering into contracts tying up all of the Bureau's available power[16]

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[16] See footnote 6 at p. 9, *supra.*

—should not be sanctioned by the Federal Power Commission. That is not the purpose for which it was created, and we suggest that it is a violation of its functions and an abuse of the administrative discretion vested in it by Congress to have done so. We submit that the majority should have concurred with the dissenting Commissioners when they said: "* * * PG&E * * * having made its bed, should be required to lie in it,—absent some showing of harm to the public interest if this axiom were followed" (R. 473).

Moreover, that the Commission itself recognized that some justification of its action was necessary in addition to its erroneous contention that as a matter of law the contract could be abrogated unilaterally under Section 205, is evident from the lengths to which the Commission has gone in its opinion in attempting to justify its action. An examination of these attempts at justification will show that they are arbitary, capricious, unsupported by the evidence and contrary to the evidence.

Primarily the Commission advances three contentions,[17] in justification of its order:

> (a) "Second, we find Sierra's argument that it has foregone other sources of supply in reliance upon the continuance of all terms of the 1948 agreement unconvincing in the light of the record which clearly
>
> [53]
>
> shows that in 1948 Sierra regarded the // other sources of supply as being so unacceptable that PG&E became, in fact, the only feasible source.
>
> (b) "Third, we also find unconvincing Sierra's argument that it would be grossly unfair to change the rate

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[17] The Commission also relies on the legal question as to the validity of the contract, fully discussed heretofore, and includes an irrelevant assertion that the Commission is not bound by the decisions of the California Commission.

> set forth in the 1948 contract while leaving all other terms unaltered, in view of the fact that Sierra has not shown, and on cross examination its president could not suggest any alterations which he thought should be made in other terms if the rate were changed as proposed.
>
> * * * * * * *
>
> (c) "Fifth, even if PG&E's entry into the 1948 contract were to be accepted as demonstrating that the then foreseeable rate of return under that contract must be deemed the rate of return which is still reasonable for this particular business, it appears from the record here that due to the increases in other costs which have occurred, since the presently proposed increase will merely restore that rate of return, not go above it." (R. 451-452)

Upon examination of the record it will be seen that none of these attempted explanations will bear analysis in the face of the undisputed facts disclosed by the record. On the contrary, it is plain from the record that they are arbitrary, capricious, unsupported by the evidence, and contrary to the evidence.

A

It is clear from the testimony of PG&E's own officials and from documents produced from its own records that the threat of Bureau competition was the motivating factor in inducing PG&E to enter into the 1948 contract.

The Commission in its opinion justifies its approval of the proposed new rate, despite the low return on the ground that

> "It is apparent that PG&E regards the deficiency of
>
> [54]
>
> .75 of a percentage point as warranted *in order // to attract and retain this particular business in the face*

> *of the alternatives that may have been available to Sierra.*" (Italics added.) (R. 465)

Nevertheless, the Commission also asserts that it finds Sierra's arguments that it has foregone other sources of supply in reliance upon the 1948 agreement unconvincing because "Sierra regarded the other sources of supply as being so unacceptable that PG&E became, in fact the only feasible source" (R. 451). Of course, as a matter of law it is immaterial whether Sierra drove a harder bargain than its bargaining position truly justified. A contract can hardly be set aside either in law or in equity because one of the parties got the better of the bargain. But we think the record so clearly establishes the exact reverse that it is apparent that the Commission's finding in this regard is so arbitrary as to be little less than capricious.

The Court will recall that at the hearings before the California Commission held in 1950, PG&E expressly requested the Commission to exempt twenty of its contract customers from a proposed rate increase, explaining that the contracts had been entered into to meet competition and that it would be "double dealing repudiation" to seek an increase. Sierra had not been included in the original list, but in the course of the hearings Mr. J. S. Moulton, vice president and executive engineer of PG&E, asked that Sierra be added to the list in the following language:

> "* * * There is one other similar contract which should be added to Exhibit K [the exhibit listing the customers to be exempted from the rate increase], in my opinion. That is a 15-year contract made with the Sierra-Pacific Power Company dated March 4, 1948, which was approved by this Commission in Decision [55] No. 41,537 dated April 27, 1948.// That contract was

> negotiated under conditions much the same as those which existed in the case of the Redding contract, and these other contracts which I have described". (R. 271)

The Redding contract to which Mr. Moulton referred provided for a rate of 10% lower even than the straight P-31 rate. This low rate had been approved because it was shown that the City of Redding was within ten miles of the Shasta Dam so that its bargaining position was particularly strong (R. 278).

Furthermore, in answer to a question on cross examination as to why the contract with Sierra Pacific Power Company should also be exempted from the proposed increase, Mr. Moulton replied:

> "* * * That goes largely to the fact that the contract along with the contracts such as with the City of Redding, which you heard something of this morning, were obtained under competitive conditions with those groups in Nevada which were actively interested in trying to get the Bureau of Reclamation to give service to the Sierra Pacific area in Nevada from the Central Valley Project in California. We finally made a 15-year contract with Sierra Pacific. We made a longer contract because we understood [sic] to build an additional line to supply them and we felt we needed that protection of a long contract. I am very sure that those competitive conditions existen then and that there is still agitation among certain groups in Nevada to get a line * * *." (R. 273)

As indicated above (pp. 9-10), in 1952, after the danger of the competition which had induced PG&E to enter into these low rate contracts had been removed, PG&E attempted to repudiate all of them except its contract with the City of Redding, which still occupied a favorable competitive position. In refusing to permit such "double dealing repudiation", the California Commission said:

> "In connection with these special contracts, we point out that the applicant, in order to forestall alleged government competition, requested authority from this Commission to enter into said contracts with the clear understanding that its stockholders must bear any burden which the applicant might sustain as a result of the operation of any such contracts. Therefore, equity calls for the treatment which we have accorded to these special contracts." (R. 285-286)

Moreover, that in the final negotiations resulting in the offer of the contract embodying the P-31 rate, PG&E's management was concerned solely with the problem of meeting competition is incontrovertibly established by documentary evidence produced from PG&E's own files. We have seen that on January 22, 1947, PG&E offered Sierra a new 15-year contract which was wholly unacceptable to Sierra, and that throughout the spring and summer of that year Sierra carried on intensive negotiations with the Bureau of Reclamation looking to the possibility of bringing low cost government power to the consumers of Nevada. On August 15, 1947, these negotiations had progressed to such a point that the Bureau of Reclamation wrote PG&E to inquire about the possibility of having PG&E transport Bureau power from Shasta Dam to Nevada over its own transmission facilities for delivery to Nevada (Sierra) at the Summit (R. 415-416). The record shows, in the form of extracts of the minutes taken at meetings of the Advisory Committee to PG&E's President, that PG&E thereupon made great efforts to compel Sierra to accept the contract proposal of January 22nd (R. 338-341). These efforts culminated in the conference with Sierra's President on October 4th at which the January 22nd contract offer was flatly rejected (R. 339-341). Immediately after Sierra's refusal to accept this proposal to continue with PG&E at the existing

high rate, // PG&E's President directed that a study be made of the applicability to Sierra's business of PG&E's P-31 rate (R. 340-341).

In evidence as Exhibits 44 (R. 416-424) and 45 (R. 424) are the studies which were made by PG&E in response to the direction of its President to consider the application to Sierra of the P-31 rate.

Owing to the failure of PG&E to produce these exhibits (which were only discovered accidentally by Sierra at the very close of the second hearings (R. 114-118)) and call the officials who had prepared them as witnesses, it is necessary to scrutinize them rather closely in order to understand their true significance.[18] But we think it is quite apparent from an examination of Exhibit 45, which consists of pencil notations made by Mr. Sutherland, Vice-President in Charge of Sales of PG&E, on October 11, two weeks before the contract was finally offered to Sierra, that he was concerned entirely with the problem of meeting the threatened competition from the Bureau, and particularly that he was anxious to meet the Bureau's proposal that

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[18] PG&E's witness in support of Exhibits 35 (Revised), 36 (Revised), 39, 40, 41 and 42, frankly admitted he had never seen Exhibits 44 and 45 before. However, when confronted with them he dutifully attempted to discredit them as "hastily prepared" and a "hodge-podge", notwithstanding the fact that they had been prepared at the direction of PG&E's President by the Vice-president in charge of Sales and the witness' own chief, PG&E's Chief Rate Engineer. (Official Stenographer's Report, *In the Matter of Pacific Gas and Electric Company*, Docket No. E-6482, pp. 1318-1332, 1333-1337, 1326 of the Record before the Court of Appeals.)

PG&E should transport or wheel Bureau power for the Bureau's account to the Summit (R. 424). On the second sheet of Exhibit 45 he says that if PG&E agreed to do this, "* * * we would be under pressure to do the same for others" (R. 424).

On Exhibit 45, Mr. Sutherland computed the costs to Sierra of purchasing power at the Summit under the

exchange or wheeling agreement at the Bureau's advertised resale rate plus PG&E's transmission costs, and compared the results with Sierra's costs if it purchased the power from PG&E under the P-31 rate. These computations show, as Mr. Sutherland puts it, that "there is little to gain. (—2 to 4%)" (R. 424). Later on, he concludes "It is a toss-up between P-31 and CV [Central Valley or Bureau rate] + costs to Summit. The exchange basis plus charges is no better than P-31" (R. 424).

Thus it is apparent that PG&E's management was concerned solely with the problem of meeting the two proposals for supplying Sierra being advanced by the Bureau of Reclamation.

The Commission's contention that, despite this incontrovertible evidence taken from PG&E's own files and the testimony of its own officials, the record discloses that PG&E was really the only source of additional power available to Sierra is based upon the testimony of Sierra's witnesses before the California Commission in 1948 at the hearing at which the approval of the contract was under consideration. As the record of that hearing shows (R. 198-259), approval of the contract was being vigorously opposed by numerous representatives of consumer interests in the State of Nevada, who were insisting that further time should be given them to study the situation and determine whether or not the proposed contract was really better than the Bureau's offer to furnish Sierra with cheaper power from Shasta Dam (R. 254-255). Indeed, at the close of the hearings, the Commission granted these objectants additional time in which to determine whether they had any evidence to present in support of their contentions (R. 257-258).

In opposition to these contentions Sierra's management, having entered into the contract, naturally emphasized the reason which had impelled them, after due deliberation [59] and a comparison between PG&E's offer and the pending offer from the Bureau, to accept PG&E's offer of the P-31 rate, even though its costs would average .5 mills higher than the cost under the Bureau's proposal; namely, the probable inability of the Bureau to construct the new lines in time to meet the anticipated forthcoming peak demands.

But even so, the testimony relied on by petitioners does not support their contention. On the contrary, the testimony of Sierra's rate-engineer is merely that the anticipated delay in constructing the line "* * * meant that if we should take power from the Bureau and that if our load continued to increase at the present rate we would not be able to take on additional loads during 1950 or 1951 until the Bureau line was placed into operation" (R. 221-222). And again, "After taking all of these points into consideration I recommended to Mr. Tracy [President of Sierra] that, in my opinion, the Pacific Gas and Electric Company was the best [not the only available] source of supply at the present time, that the Reclamation Bureau contract was premature" (R. 223).

Respondents also place reliance upon various memoranda prepared by Sierra's management in which emphasis is laid on the undesirable features of the Bureau's proposals (R. 345-355). We think it is obvious that, having determined to accept PG&E's offer and to reject the Bureau's, Sierra's management was preparing to meet the criticisms which it knew would be leveled against it by the Nevada interests. Just as PG&E's vice-president, Moulton, advised his management in February 1948, that if the proposed contract were attacked because of the low rate it could be justified only on an incremental cost basis (R. 426-427), so Sierra's management knew that it could only satisfy the objections of Nevada consumers and their representatives by empha-

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sizing the undesirable features of // the Bureau's proposals. Certainly this evidence does not prove that PG&E was the "only feasible source of power."

It seems to us that a consideration of this evidence conclusively demonstrates that if PG&E had not offered to reduce the existing rate to the substantially lower P-31 rate, Sierra would have been forced by public opinion, the demands of its consumers, and in all probability by the Public Service Commission of the State of Nevada (all of which interests were represented at the hearing), to accept the Bureau's pending proposals or find another source of power. They would never have been permitted to accept PG&E's original offer of a new 15 year contract at existing rates, for the obvious reason that the very material saving in costs under the Bureau's proposal would outweigh whatever inconvenience might result during the peak periods from the delay in constructing the transmission lines.

B

The only reason Sierra can not point to any provisions of the contract from which it should be relieved if the rate is increased is that its alternative sources of power no longer exist.

In a further effort to justify its refusal to abandon cost of service as the test of the reasonableness of PG&E's increased rate, the Commission states:

> "Third, we also find unconvincing Sierra's argument that it would be grossly unfair to change the rate set forth in the 1948 contract while leaving all other terms unaltered, in view of the fact that Sierra has not shown, and on cross examination its president could not suggest any alterations which he thought should be made in other terms if the rate were changed as proposed." (R. 451)

The short answer to this statement, of course, is that Sierra's position has so changed since the 1947 negotia-

[61]

tions leading to the contract with PG&E that it serves no purpose now for Sierra to be relieved from other provisions of that contract. It is a matter of common knowledge that the cost of building steam plants has increased so much since 1948 that that source of power is no longer available (R. 19-20), and as we have seen, PG&E itself has successfully removed the possibility of Sierra obtaining Shasta power directly from the Bureau by contracting to purchase all of Shasta's available power for its own use (R. 17-18, 57-58, 58-61).

Having relied on PG&E's good faith when it entered into the contract (and which PG&E reaffirmed before the California Commission in 1950 (R. 268-271, 277-278), Sierra is now in a position where if PG&E is permitted to repudiate its contract, there is no relief which Sierra can obtain by having the Commission rewrite other provisions of that agreement. Its only apparent relief will be to seek increases in its local rates from the Public Service Commission of Nevada, and thus pass its losses from the Commission action on to its consumers.

C

The Commission's attempt to justify its decision on the ground that the rate of return under the new rate is no higher than the rate anticipated under the contract is not only immaterial, but is wholly unsupported by the record, and, indeed, is directly contradicted by the record.

The Commission seeks also to justify its decision upholding PG&E's increased rate upon the ground that it will provide PG&E with no more than the rate of return which was reasonably foreseeable to it at the time it negotiated the 1948 contract with Sierra (R. 464-465, 453).

This contention is admittedly based upon the mere inference that in late 1947 PG&E's management, using cost of

service studies made in 1946, estimated the rates of return which it could expect to receive from a contract with Sierra before offering Sierra, on October 25, the P-31 rate upon which the contract was finally negotiated (R. 453-454). The Commission bases its "inference" upon PG&E's Exhibit 35 (Revised), which purports to develop this "reasonably foreseeable rate of return", but is conceded to be purely a hypothetical reconstruction of something that never happened — a present guess of what PG&E's management *would have computed had they in 1947, made such a study* (R. 356-408, 453).

The short answer to the Commission's reliance on this "exhibit" is that the affirmative evidence in the record—not mere inference—*shows those considerations which actually did motivate* PG&E in its contract negotiations with Sierra and *those studies which PG&E actually did make* in advance of offering the 1948 contract terms to Sierra, and that evidence conclusively shows that those considerations bore no relation whatever to the "reasonably foreseeable" rate of return relied on by the Commission.

As we have just seen, Exhibits 44 (R. 416-424) and 45 (R. 424) are the studies which were made by PG&E in October of 1948, in response to the direction of its President to consider the application to Sierra of the P-31 rate. Exhibit 44 was prepared by the same Mr. B. B. Beckett, PG&E's rate engineer, who, as we have seen above (pp. 25, 26), was PG&E's witness in support of the P-31 schedule before the California Commission in 1945. The Court will recall that Mr. Beckett's basic thesis was that the P-31 rate was profitable to PG&E if computed on an "incremental basis", even though it would not be, if computed on the customary "allocated cost of service basis" (p. 26, *supra*).

The Commission majority seeks to dismiss these exhibits by asserting that "[t]hey were not computations of

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PG&E's costs of service under the P-31 rate * * *" (R. 454). But Sheet I of Exhibit 44, under the legend "Cost to PG&E Co." shows exactly what the cost of serving Sierra under the P-31 rate would be and what elements would be involved in that cost (R. 49). It shows also the revenue both for the year 1947 actual and for the years 1952 and 1960 estimated—and that the revenues "On P-31 plus $30,000/Year" (for standby) would substantially exceed the costs (R. 418).

The method used in determining the cost to PG&E is described in detail on Sheet 3 of Exhibit 44, which begins as follows:

> "*Cost to P.G.&E.*
>
> The method used in computing the cost to P.G.&E. of power delivered to Sierra at Summit, assuming this power to be purchased at Shasta Substation under our present Shasta contract, is the same as that developed for our study of 7/16/47 on the Denison Dam contract provisions applied to our system. * * *" (R. 421)

This sheet then lists and explains the items included in arriving at these costs, which are computed on an "incremental-cost basis" (R. 474), and not on the basis of any such study as that set forth in Exhibit 35 (Revised). They are made up of PG&E's cost of purchasing the power from the Bureau at Shasta Dam and the cost of transporting the power to the Summit, which include "* * * 6% for return and 2.2% for income taxes on historical cost" (R. 421). As we have just pointed out, PG&E always computed its estimated costs and estimated return under its P-31 contracts solely on an "incremental basis".

Mr. Beckett's study also compared the results under the P-31 proposal with existing rates and with the Bu-

reau's alternative proposal to build its own lines over the mountains and transport power directly into Nevada, where it would be resold to Sierra at the Bureau's resale or "postage stamp" rate (R. 416-424). As appears on the face of the memorandum transmitting that study, it was to be taken to Reno in connection with the forthcoming meeting on Ocober 24. It was at that meeting that Sierra was first offered the P-31 rate which it ultimated accepted.

Thus, the conclusion is inescapable that PG&E offered the P-31 rate on the theory that it could be justified if costs were allocated on an incremental basis (R. 426-474), as pointed out by the dissenting Commissioners (R. 472-474), and that the use of this method of allocating costs was dictated by the need of meeting the threatened competition from the Bureau and holding Sierra's business. As we have seen, that is just what the P-31 rate was designed for.

We submit that the existence of Exhibits 44 and 45 conclusively shows that Exhibit 35 (Revised) is of no probative value whatever in these proceedings under any theory, that it should never have been offered in evidence by PG&E, and should never have been accepted as evidence by the Commission. We can see no possible basis for accepting a concededly hypothetical reconstruction of a study that was never made in order to show what PG&E's management might have been thinking about when they entered into this contract, when Exhibits 44 and 45 clearly show that at that very time they were in fact thinking about something quite different.

We submit that this record overwhelmingly sustains the position of Commissioners Doty and Smith that "* * * Sierra's request to file its proposed supplemental requests for findings of fact and conclusions of law [relating to Exhibits 44 and 45] should not be brushed aside lightly

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as 'unnecessary or unwarranted'" (R. 474-475). Certainly they cannot be brushed aside on the ground that "[t]hey were not computations of PG&E's costs of service under the P-31 rate * * *" (R. 453-454).

Thus the Commission's attempted explanations of its action in permitting PG&E to increase its rates in violation of its contract are arbitrary, capricious, unsupported by the evidence, and contrary to the affirmative evidence in the record. The record contains no reasonable or justifiable explanation of the Commission's action. The contract rate is "the lowest rate available" to Sierra and its customers. Enforcement of the contract in accordance with its terms will cause no injury to anyone except the stockholders of PG&E. Those stockholders got the benefit of the contract when Sierra gave up all opportunity of obtaining cheap Government power from the Bureau. Having obtained that benefit, there is no possible public interest requiring that they be relieved of the burden of paying the agreed price for that benefit. The order below should be set aside as an abuse of administrative discretion, quite apart from the legal question as to the validity of the contract.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

William C. Chanler,
40 Wall Street,
New York 5, New York,
Attorney for Respondent,
Sierra Pacific Power Company.

Elliott E. Vose,
Gerard Thomas,
William W. Karatz,
40 Wall Street,
New York 5, New York,
Of Counsel.

[No Number]

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 51

FEDERAL POWER COMMISSION,
Petitioner,
vs.
SIERRA PACIFIC POWER COMPANY,

No. 53

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,
vs.
SIERRA PACIFIC POWER COMPANY.

Reply Brief for Petitioner Pacific Gas and Electric Company

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REPLY BRIEF FOR PETITIONER PACIFIC GAS AND ELECTRIC COMPANY

Respondent's argument is based entirely upon erroneous views of the nature of the regulatory process under the Federal Power Act. In an attempt to bolster his position, Sierra's counsel has attached labels, such as "repudiation", which beg the question, and has tried to influence this Court through misstatements of fact and argument about equities which the Commission rejected, after full consideration, in favor of clear evidence to the contrary.

The decision of the Court below was based upon its interpretation of the Federal Power Act, and did not concern itself with the equities of the case. We take up first, therefore, the legal aspects of the case, but would remind this

[2]

Court that under the Commission's interpretation of Section 205 of the Federal Power Act, it would be impossible for the cost of power to Sierra to be increased in excess of the amount determined by the Commission to be just and reasonable, and Sierra has not at any time paid any money in excess of the just and reasonable rate for the service rendered nor did the Court below find otherwise.

1. The "Just and Reasonable" Standard Was Correctly Applied by the Commission in This Proceeding.

A. The "Just and Reasonable" Standard is a Commission Determined Standard.

The basic principle of the Federal Power Act is that all rates must be just and reasonable, as ascertainable standard which is to be precisely applied by the Commission. In no case does the Commission's standard yield to a determination by the utility, either acting alone or in concert with a contracting party, that some other rate is reasonable. That the utility's determination might fall within the judicially permissive area for Commission action is immaterial. The "area" results from the limitation on the judicial application of the "just and reasonable" standard. The standard itself is precise and is to be applied by the Commission to all rates, not merely to rates which fail to meet the test of the judicial power.

Realizing that recognition of these principles would destroy the foundation of the decision of the Court below, Sierra is compelled to assert that the Commission can apply only an "area" standard to measure the reasonableness of the utility's filed rate.[1] If this is so, the Commission is required to accept a rate which is not consistent with the

Commission's definite standard of reasonableness, a result certainly not intended by Congress. In actual practice, the Commission has accepted no such limitation on its powers.[2]

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[1] In a Section 205(e) hearing, the filed rate would be the new rate proposed by the utility, and, in a Section 206(e) hearing, the filed rate would be the existing rate.

[2] A recent example is *In the Matter of Natural Gas Pipeline Company*, decided by the Commission April 1, 1955, (F.P.C. Docket No. G-2302, reported in Commerce Clearing House Utilities Law Reporter (Federal) at paragraph 9459) where the Commission's examiner passed upon a rate filing which he found was expected to produce a rate of return of 6.1%. The examiner approved the filing and rejected a contention that the filing should be found unreasonable because in a prior proceeding the Commission had approved only a 6% return for this Company. In the examiner's view, the difference between the rate proposed and the slightly lower rate, which would be sufficient to produce a 6% rate was minor, approached the realm of the infinitesimal, and was "de minimis", and he stated that reasonableness is established by a zone rather than a fixed point. The Commission, however, rejected the examiner's conclusion and

At one place Sierra says that the Commission's "duty in reviewing that rate (i.e. a filed rate) is the same as that of a court sitting to review a rate fixed by the commission".[2a] Elsewhere Sierra says that it is obvious that the Commission's test is "quite different" from that of a court.[2b] The latter statement is of course true. The Commission's test is precise.[2c] Sierra cites no authority in support of its contention for an "area" limitation upon the Commission, whether or not equivalent to an "area" concept of the court.

The astonishing nature of Sierra's contention is demonstrated by the fact that its alleged "zone" would have encompassed two such widely different rates. The old rate

produces only 78% of the revenue which the Commission found reasonable under the new rate.[2d] The difference in net return is even greater since the old rate produces only 55% of the return allowed by the Commission under the new rate.[2e]

It should also be pointed out that Sierra's views of the Commission's authority in rate proceedings, like that of the Court below, necessarily extends not only to contract-

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reduced the rates to yield only 6%. The Commission observed that although "a difference so slight does not in and of itself represent the difference between a fair and unfair rate of return", the return "must be fixed, in the final analysis, upon the Commission's best judgment of what is fair, considering the evidence of record and guided by the basic facts required by law to be considered." Since the examiner's decision cited evidence upon which a rate of return in excess of 6.1% was affirmatively justified, there can be no doubt that the Commission was applying its own expert judgment and was not exercising merely the review functions of a Court.

[2a] Respondent's Brief p. 36.

[2b] Respondent's Brief p. 35.

[2c] See the citations at pp. 19 and 23 of PG&E's Opening Brief.

[2d] Derived from data at R. 137.

[2e] Derived from data at R. 295.

specified rates, but to all rates. Were such views to prevail, a utility which had a rate within the permitted area would be entitled to continue it in effect even though the Commission concluded that a lower rate was reasonable for the service rendered. However, if the utility's rate just barely exceeded the permitted bounds, its charges would be reduced to the level found by the Commission to be reasonable. The utility, however, would then be able to attempt to place an increase in effect which would fall just slightly below the upper limit. By a process of trial and error, a utility could attempt to keep its rates close to the upper limit of the zone, thus completely nullifying the Commission's expert and precise determination of the reasonable rate.

It is no wonder that Sierra concludes that its position would not handicap the Commission; it believes that the Commission is hamstrung to begin with. Our statement that the acceptance of this position by the Court below impairs the Commission's effectiveness is fully confirmed. We submit that Sierra's argument is entirely without foundation in statute, case authority, or practical experience, and would deprive the public of the benefit of regulation by an expert and especially informed agency, as intended by Congress.

This is the crux of the case. If the Commission's standards are controlling, there is no occasion to read into Section

[5]

205(d) a special rule for contract-specified rates. Whatever the utility may file, the Commission's standard will determine the outcome.

B. The Cost of Rendering Service, Including the Return to Investors, Is a Relevant Factor in Every Rate Determination Proceeding.

Congress has by Section 205(a) declared that the public interest requires all rates for public utility service to be just and reasonable. This Court said in the *Hope* case:[3] "The rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates involves a balancing of the investor and consumer interests." The Court then points out that this requires that revenues cover not only operating expenses, but also capital costs.

This concern for the investor interest is more than a matter of the rights of investors as individuals, important as these rights are. Each utility enterprise must recover its costs including cost of capital through its rates or not at all. If those rates do not cover a fair return to investors the added risk will increase the cost of capital and rapidly affect the costs to all of the consumers of the utility. The return from any part of the enterprise cannot be insulated from the business as a whole. Its effect does not depend on whether the utility is on the verge of bankruptcy or in danger of having to abandon service.

In the case at hand, PG&E is obliged to place in service an additional 110,000 volt transmission line to meet Sierra's expanding load,[4] and, of course, will also have to add the necessary generating capacity for this purpose. The capital for these facilities could not possibly be raised on the basis

[6]

of revenue from the 1948 contract-specified rates, yielding only 2.6% return.[5] It can be raised only on the general credit of PG&E. Is it not in the public interest, then, that Sierra pay its just and reasonable share in the maintenance of that credit?

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[3] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 at 603 (1944).

[4] PG&E's obligation to do so under the 1948 contract is stated at R. 143-144. Construction of the line was initiated this year at an estimated cost in excess of $1,000,000.

[5] R. 295.

Sierra answers "No" and insists that the "profitableness" of a contract-specified rate is irrelevant as a matter of law, unless the public interest is affected.[6] The "unless" clause of Sierra's statement actually destroys the value of Sierra's argument.

Congress has already determined that the public interest requires that all rates shall be just and reasonable. In Section 201 of the Federal Power Act Congress declared that "federal regulation * * * of that part of such business which consists of * * * the sale of such energy at wholesale in interstate commerce is necessary in the public interest * * *". In Section 205(a) Congress required that "all rates and charges * * * for the sale of electric energy subject to the jurisdiction of the Commission * * * shall be just and reasonable and any such rate or charge that is not just and reasonable is hereby declared to be unlawful".

Thus when Sierra concedes that the public interest must be consulted it concedes that the issue is whether the rate is just and reasonable. This test, of course, is to be applied by the Commission, and the Courts cannot "as a matter of law" foreclose the Commission from determining whether the reasonableness is affected by the return.

Sierra attempts to support its position by citing three cases. One, *Columbus R. Power and Light Co. v. Columbus*, 249 U.S. 399 (1919) deals solely with the equity power of a Court and may be dismissed from further consideration. Another, *Arkansas Natural Gas Co. v. Railroad Com-*

[7]

mission, 261 U.S. 379 (1923), dealt with a state commission order under a statute which expressly denied it the power to alter contracts. The case of *Railroad & Light Co. v. Court of Industrial Relations,* 113 Kan. 217, 214 Pac. 797 (1923), was *dictum* in the course of affirming trial Court proceedings which constituted trials *de novo.* Furthermore, the reasoning of these Courts cannot be applied to rates regulated by the Federal Power Commission in the light of the *Hope* case.

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[6] Respondent's Brief p. 41.

C. The Willingness of a Utility to Accept a Rate Is Not Determinative of the Reasonableness of the Rate.

Underlying much of Sierra argument seems to be an implied assumption that Commission must accept a nondiscriminatory rate yielding less than a normal reasonable rate of return, if the utility proposes it. Such an assumption is unjustified

A proposed rate which yields a return to the utility below that to which it is entitled on its business as a whole may be reasonable because of other circumstances, but it is not reasonable simply because the management of the utility is willing to accept the lesser return. The Commission is no more bound to accept as reasonable a rate yielding 4¾% than a rate yielding 6¾%, merely because the utility has proposed it. Respondent's counsel qualifies his assertion by admitting that the Commission need not accept the utility proposed rate if it amounts to an undue preference or is discriminatory, but he ignores additional factors which must be considered by the Commission such as its concern for the financial health of the utility to the end that service to all customers will be maintained at a reasonable cost, and its obligation to see that the interests of investors in the utility are protected, since these interests constitute a part of the public interest which the Commission must take into account.

As a practical matter, of course, the Commission properly directs its immediate attention to whether the yield from a particular rate is too high, rather than whether it is too low. In the absence of circumstances which indicate otherwise the Commission may reasonably feel that the management of a utility will request as high a rate as can be justified under all the circumstances. These practical aspects, however, do not weaken the proposition that reasonableness is not a matter of what the utility is willing to accept, but is a matter which must be justified by balancing all of the public interests involved.

In filing a rate, the utility represents that its proposal constitutes the just and reasonable rate for the service to be rendered. If the utility subsequently files a higher rate and there has been no change in conditions, the Commission might give weight to the original representation and consequently question the new filing. The Commission would not, however, be bound in any way by the utility's representations.

Thus, the proposal of a particular rate may be evidence as to its reasonableness, but it cannot be conclusive. This disposes of Sierra's contention that because the Commission found reasonable a 4.75% (which is less than the 5.5% stipulated to be reasonable for PG&E's electric operations generally) return it must also find reasonable a 2.6% return (which is also less than 5.5%).[7] Such an obvious *non sequitur* cannot gain any force from the fact that PG&E was willing to accept the 4.75% return. It has not expressed any willingness to accept a lesser return from the Sierra business.

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[7] Respondent's Brief p. 46.

D. The Commission Correctly Applied the "Just and Reasonable" Standard in This Proceeding.

Actually, Sierra does not contend that the Commission erred in finding that the increased rate was reasonable. This is because Sierra is committed to the proposition that both rates are reasonable.[7a] Consequently, Sierra's attention is directed to whether the 1948 contract-specified rate is still reasonable in 1955. It answers the Commission with only two propositions.[8]

The first proposition is that the rate of return or "profitableness" of the Sierra rate is immaterial as a matter of law. This point we have already answered.

The second proposition is that the contract-specified rate represents "the minimum PG&E is willing to accept." This, of course, is absurd on its face, in the light of PG&E's request for a higher rate, unless Sierra's point is translated into the proposition that, having made a contract in 1948, PG&E is required to accept that rate whether it wants to or not. This point we have answered by showing that acceptance by the utility is not controlling in any event. Further mention should be made, however, of the application of this principle to the facts of the present case.

Sierra's second proposition is obviously only another form of its contention that PG&E contracted for a fixed rate for a term which it now appears will run 23 years. Although Sierra professes to concede that a contract rate may be changed by the regulatory process, its position seems to be that PG&E made a contract which must be applied as though that regulatory process did not exist, except for the benefit of Sierra.

[7a] Respondent's Brief, p. 47.

[8] Respondent's Brief pp. 40 to 47.

The existence of a contract does not in any way determine the reasonableness of the rate or limit the Commission's power to determine that a different rate should be charged.

The possibility of change in a public utility service contract in accordance with the law in effect at the time the contract is made must be within the reasonable expectations of the contracting parties, especially when both of the parties are public utilities and familiar with the regulatory processes. In the present case, there is no doubt that this possibility was present in the minds of PG&E and Sierra for they expressly provided in the 1948 contract that it was subject to change by the California Public Utilities Commission.[9] It also should be noted that when Sierra's management was emphasizing the advantages of the contract in testimony before the California Public Utilities Commission,[10] it did not claim that this contract had the unusual feature of creating a ceiling price, regardless of the cost of service to PG&E. We go into further detail on the evidence as to the expectation of the parties. *Infra,* subhead I, Point V.

Sierra does not relate the remainder of its argument on the facts to the issue of reasonableness and we will take them up later in this reply.

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[9] R. 145, para. 12. At the time the contract was made, it was thought that it was subject to the jurisdiction of both the California Commission and Federal Power Commission. Since the decision in *U.S. v. P.U.C.* 345 U.S. 295 (1953), it seems clear that all sales under the contract are subject exclusively to federal jurisdiction.

[10] Cf. Respondent's brief pp. 58 and 59.

II. Respondent's Contentions as to the Procedure to Be Followed Are Erroneous.

PG&E initiated this proceeding in order to change a contract-specified rate by the regulatory process established in Section 205 of the Federal Power Act. Sierra chooses to describe these same facts as a repudiation of a solemn agreement. This, of course, begs the question as to the scope and effect of the contract, and the right of a party to follow a specific statuory procedure. Elsewhere, Sierra characterizes the use of this process as unilateral abrogation of a

[11]

contract, and claims that the use of this process would permit a utility to determine when the public interest requires a utility service contract to be set aside.[11] These characterizations are a complete misdescription of the process.

A. The Procedure of Section 205 Is a Reasonable Regulatory Process, by Which a Utility May Obtain a Change in a Contract-Specified Rate, if Shown to be Necessary to Make the Rate Just and Reasonable.

The filing of a new schedule for the purpose of changing an existing rate is only the first step of a rational and constitutional regulatory process. It is not, as Sierra would have it, the mere lodging of a notice for the purpose of giving due publicity.

In the first place, the schedule is filed, not with a mere publishing agency, like the Federal Register, but with a regulatory commission. This Commission has (1) in its members and in its staff both experience and expert knowledge, (2) general information in usable form about the filing utility, as a consequence of the imposition of a uniform system of accounts and the requirement of voluminous and detailed annual reports, (3) specific information[12] about the relation of the new schedule to the old schedule and other schedules for similar service, and (4) where an increase in rates is involved, specific information[12] about the cost of rendering service.

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[11] Respondent's brief, *Mobile* case, p. 24.

In the second place, the Commission upon its own initiative or upon complaint may order a hearing upon the reasonableness of the filed schedule. The Commission need not, and customarily does not, support its order for a hearing with any justification other than the bare statement that the proposed rate may be unjust or unreasonable.

[12]

In the third place, indicating the tentative nature of a new filing, the burden of proof is placed squarely on the utility to justify any increase sought.

In the fourth place, at the conclusion of the hearing, the Commission may fix whatever rate it, in its expert judgment, deems to be the just and reasonable rate on the basis of the evidence submitted, without regard to either the existing rate or the rate proposed by the utility.

The foregoing is obviously a description of a full fledged regulatory process. This Court has had ample opportunity to observe the vigilance and zeal with which the Federal Power Commission carries out its duties under this procedure and requires the utility to prove to the hilt its justification for a rate increase. A review of the record in this case will indicate that in receiving evidence and considering all possible aspects of the case, the Commission adhered to the high standard it has consistently applied.

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[12] See Commission Rule 35.3, Title 18, Code of Federal Regulations.

Sierra, however, by assuming that the filed rate procedure consists of a bare notice to the Commission has characterized it as a procedure permitting the utility to change a contract-specified rate at will. Without this assumption, the whole argument against the use of Sections 205(d) and (e) to change contract-specified rates loses all validity.

It remains true that under Sections 205(d) and (e) an increase in a contract-specified rate may be filed by the utility and, in the absence of question by the Commission or complaint by the customer, may become effective. This is no more to be deplored than the granting of a judgment in a civil proceeding without a court hearing where there is no contest or the granting of *ex parte* relief in equity proceedings upon the affidavit of one party. In fact, because of the position of the Commission as an expert body and its special information, there is complete assurance that the public interest will be protected even in uncontested cases.

[13]

The filing of a schedule, together with the justification which the Commission requires, constitutes, in actual practice the substantial equivalent of an application under other procedures for authority to increase rates. Sierra would label the right to make such a filing "authority to a public utility to abrogate its own contract unilaterally."[13] Accurately, it is the right to initiate a rate change in accordance with law. Regardless of the label, there is no question but that the utility has no right to place in effect (except subject to refund) any rate except the just and reasonable rate for the service to be rendered.

Sierra professes to find difficulty in our interpretation of Section 205(d), but there should be no problem. If contracts

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[13] Respondent's Brief p. 30.

reason for this section to provide that the filing must precede the change by at least 30 days.
could not be changed by filing schedules there would be no

B. Section 206(a) of the Act Does Not Authorize a Public Utility to Initiate a Rate Proceeding.

We have pointed out that Section 206(a) grants to the Commission and to complaining parties the right to initiate a rate proceeding without proposing a new rate, but that a utility which desires a rate change must proceed under Section 205 to propose a new rate and justify its reasonableness.

Respondent seems to acquiesce in the proposition that the Section 206(a) procedure is not available to the utility. Its denial to the utility of a right to initiate a proceeding under Section 205 would make the Federal Power Act completely one-sided with respect to contract-specified rates. Unquestionably, the customer party to a contract may institute a rate proceeding whenever it believes that the utility's costs

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have decreased, or that other circumstances have arisen, so that the contract-specified rate is no longer just and reasonable. The logical and reasonable interpretation of the Act would give the utility the corresponding privilege under Section 205, whenever it believed that increases in cost, or other factors, made the old contract-specified rate unreasonable.

C. No Considerations Advanced by Sierra Justify Its Contention That PG&E's Use of the Section 205 Procedure Was Unlawful.

We have already pointed out the irrational nature of Sierra's contention that there is more than one reasonable rate which the Commission must accept in a rate proceeding. A rational view of the Commission's powers clearly requires that the result be the same under either procedure and no considerations of substance need enter into the choice between them.

Sierra does not dispute that the interim collection procedure of Section 205(e) equitably minimizes the burden of regulatory delay.

Sierra's argument that Section 205 is like the rate filing procedure of Section 20 of the Kansas Act, involved in the Wichita Case, because Section 205 (e) does not provide for a hearing on the reasonableness of the contract-specified rate misses the point.[13a] Section 20 did not provide for any hearing at all whereas Section 205 (e) provides for a hearing which encompasses all relevant issues.

We assume that the reply brief for the Federal Power Commission will deal with the discussion of cases by the Respondent in the *Mobile* case and the unwarranted characterizations there made and we deem it unnecessary to discuss them further here.

III. The Record and the Authorities Fully Establish That the Commission Made a Finding That the Old Rate Was Unreasonable and That This Finding Fully Supports the Commission's Order.

Sierra, of course, had to concede by silence that (1) the issue of reasonableness of the old rate was directly presented to the Commission by proposed findings of PG&E and Sierra, (2) all evidence material to Sierra's contention on this issue was received, and (3) the Commission's conclusion of unreasonableness was expressly incorporated in the formal findings.

[13a] Respondent's Brief in the *Mobile* Case, p. 35.

Nevertheless, Sierra makes the bald statement that the finding was not made. Nothing that Sierra says justifies this conclusion and it cannot be doubted that the Commission made this finding to avoid the necessity for further proceedings in the unlikely event that its view of the procedure was rejected.

Sierra makes more of an argument to the effect that the Commission's finding cannot validate the rate increase during the nine months' period from September 6, 1953 (when the suspension terminated) to June 17, 1954 (the date of the Commission's decision). It seems fair to conclude then, that the finding would, in Sierra's view, support the rate increase after June 17, 1954, except for the hypertechnical argument that the proceeding has been styled one under Section 205, instead of Section 206(a). In arguing that the rate increase could not be validated for any period preceding the date when the Commission supplied the necessary finding, Sierra ignores *Atlantic Coast Line R. Co. v. Florida,* 295 U.S. 301 (1935), which we cited in our brief.

In that case, increased freight charges were collected by a railroad in accordance with an order of the Interstate Commerce Commission. This order was set aside on the ground that the findings of the Commission were incomplete and inadequate. Still later, the Commission upon new evi-

[16]

dence and adequate findings, made the same order it had before. Certain shippers sought restitution of the increase in rates collected while the first, invalid, order was in force. This Court held that no restitution should be granted. Much of what was there said by Justice Cardozo is applicable here, but we confine our quotation to his description of the reasoning of the Court:

> "* * * All that the federal court does is to announce that it will stand aloof. It inquires whether anything has happened whereby a court of equity would be moved to impose equitable conditions upon equitable relief. In the course of that inquiry it perceives that the charges were collected under color of legal right, in circumstances relieving the carrier of any stigma of extortion. It discovers through the evidence submitted to the Commission and renewed in the present record that what was charged would have been lawful as well as fair if there had been no blunders of procedure, no administrative delays. Learning those things, it says no more than this, that irrespective of legal rights and remedies it will not intervene affirmatively, in the exercise of its equitable and discretionary powers, to change the status quo." (295 U.S. 315)

The parallel with the present case is clear. In both cases a finding claimed to be necessary was not made before the collection period started. In both, the finding, when made, established the reasonableness of the amount collected and the unreasonableness of the low rate for the entire collection period. For the reasons advanced by Justice Cardozo, it is clear that the Commission should be affirmed even if it was in error procedurally.

We have already dealt with Sierra's contention[13b] that the Commission erred in finding the old rate unreasonable. Refer to subhead D of Point I, supra.

IV. Sierra Has Failed to Show Adequate Reason Why the Proceeding Should Be Dismissed Even if a Further Formal Finding Was Required.

[13b] Respondent's Brief, subhead C, Point III, pp. 40-47.

Sierra concedes that it should be unnecessary to duplicate the prior hearing on this matter and is now willing to have the order of the Court below amended to instruct the Commission "to dismiss the proceeding under Section 205 without prejudice to the continuation of further proceedings under Section 206(a)".[14] This ingenious "dismissal with continuation" is proposed for the purpose of avoiding the possibility of a *nunc pro tunc* order of the Commission, supplying in even more formal terms the finding which has already been made. It is simply an attempt to interpose a technical obstacle to the retention by PG&E of a rate established as the just and reasonable rate for the service rendered.

We would point out also that Sierra does not contest the principle that if there were a mistake of law, the sole function of the Court below is to send the case back for further proceedings to correct the error.[14a]

V. Sierra's Statements of Fact Are Misleading and Erroneous.

Finding that many of its arguments are irrelevant to the issue of reasonableness of the rate Sierra has incorporated a miscellany of items in its statements of fact and in a point which refers vaguely to abuse of administrative discretion.[15]

These contentions are based on statements of fact which are sometimes totally erroneous and sometimes simply misleading. We take up what seem to us the more important errors.

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[14] Respondent's Brief, p. 32. footnote 10.

[14a] PG&E Brief, p. 38.

[15] Respondent's Brief, p. 50.

A. Sierra's Repeated Statement That PG&E Entered Into Contracts Tying Up All of the Bureau's Available Power Is Contrary to Fact.[16]

There is no evidence whatever to justify this statement. PG&E agreed, in April 1951, to "wheel" power for the Bureau. PG&E purchases no power under this agreement. In October 1951 PG&E made an agreement to purchase from the Bureau power in excess of that which the Bureau wished to sell to any customer. PG&E obviously tied up nothing by these contracts.

These contracts are not in evidence and there is no competent description of their terms in the record. We are compelled to go outside of the record because of Sierra's unjustified charges, which have no evidentiary support.

B. Sierra's Statement That PG&E Denied in its Brief Before the Court of Appeals That It Entered Into a Wheeling and Purchase Agreement is Contrary to Fact.[17]

This is not at all what we denied. Sierra's reference is to our denial of an entirely different proposition. We actually said:

> "Sierra attempts to impute bad faith to PG&E on the ground that it has sought an increased rate because it has made Shasta Dam power unavailable to Sierra. The imputation is false. Although it is true that PG&E purchases all the power from Shasta Dam not otherwise disposed of by the Bureau of Reclamation, it is also true that the Bureau has no continuing obligation to sell such power to PG&E and may sell to any cus-

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[16] Respondent's Brief, pp. 52 and 61.

[17] Respondent's Brief, p. 9, note 6.

> tomer it chooses. There is no testimony to the contrary in this record and this Court should be advised that such is the actual fact."[17a]

Our statement is still true. Sierra attempted to answer it by referring to a telephone conversation which showed that the Bureau had made a contract in 1952 to sell 290,000 kilowatts of power to the Sacramento Municipal Utility District. This demonstrated that it was the Bureau which tied up its power, not PG&E.

C. Sierra's Repeated Statement That PG&E First Attempted to Increase the Sierra Rate "After the Threat of Competition Had Been Removed" is "Contrary to Fact.[18]

The fact is that PG&E filed its specific proposal for an increase in the Sierra rate in October 1951,[19] some 14 months before December 1952 when the Bureau made the 290,000 kilowatts contract above referred to.

When the events are considered in the order in which they occurred it is clear that PG&E initiated the increase in contract specified rates simply for the purpose of meeting increased costs and that the filing was made after the PG&E had agreed to provide facilities by which most of the contract customers could actually obtain power from the Bureau.

[17a] Brief for Intervenor PG&E in U. S. Court of Appeals for District of Columbia, p. 33.

[18] Respondent's Brief, pp. 9-10; see also pp. 52 and 55.

[19] See *In re Pacific Gas and Electric Co.,* 52 Ops. & Ord. Pub. Util. Comm. of Calif. 113; 96 PUR(NS) 493.

D. Sierra Did Not Have Even the Hope of a Proposal to Obtain Bureau Power Through PG&E Wheeling.

One of the two alternative which Sierra claims to have been responsible for the rate of the 1948 contract is a proposal for "wheeling" Bureau power over PG&E lines to Nevada.

It would indeed be amazing if PG&E should turn out to have been willing to supply the means by which the Bureau

of Reclamation could take over the Sierra business. The fact of the matter is that Sierra cannot show that it ever considered it possible that PG&E would wheel Bureau power. Certainly, Sierra's president would have been dishonest if he had thought that wheeling was a competitive possibility and yet testified in 1948 that the reason Bureau power could not be considered was that it would take too long to get a Congressional appropriation and build the required transmission line. That he was honest in that is borne out by the statement of Sierra's counsel at the same hearing that wheeling was "utterly impossible".[20] In fact, it did not even occur to the present counsel for Sierra to argue the wheeling possibility in his original brief in 1953 to the Federal Power Commission.

To support its charge of self-competition by PG&E, counsel for Sierra points to the fact that the Bureau asked PG&E to wheel to Nevada and that PG&E studied the cost and revenue implications of such a proposal. It is abundantly clear, however, that PG&E was not willing to "wheel" to Sierra for the Bureau's benefit. In fact, PG&E maintained the same position when it finally agreed to wheel power for the Bureau in the Central Valley region of California. PG&E could not now be said to have deprived Sierra of an opportunity to obtain power by wheeling when Sierra never had such an opportunity in the first place.

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[20] R. 242.

E. The Proposal for Construction of a Power Line Over the Sierra-Nevada Mountains to Supply Sierra with Power from Shasta Dam Could Not Have Met Sierra's Power Requirements.

The proposal of the Bureau to construct a power line was a mere possibility, depending upon obtaining an appropriation from Congress. Admittedly, the line could not have been completed in time to meet Sierra's requirements. Counsel for Sierra attempted to meet this defect in his argument to the Federal Power Commission by asserting that Sierra could have developed additional plants "to tide over the expected shortages until the Bureau's lines could be completed."[21] This statement was made in the face of testimony by Sierra's president that construction of the plants would have taken a minimum of three years.[22] The absurdity of making an investment in generating plants for the purpose of "tiding over" a brief span of years is manifest.

In arguing to this Court, counsel now prefers to assume that Sierra would simply refuse to supply the additional power needed in its area. Although Sierra's rate engineer mentioned such a refusal in his testimony given in 1953, it is plain that no one in 1947 or 1948 proposed or considered such a course, which would constitute failure by Sierra to live up to its public utility obligations.[23] Least of all, do we think that Nevada Public Service Commission would have permitted such a situation to arise, even though in 1953 it said that it might have ordered construction of additional plants in 1948.

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[21] Sierra's opening Brief before the Federal Power Commission, p. 66. See also p. 39.

[22] R. 217.

Uncertainty as to the obtaining of an appropriation and the certainty of delay were not the only defects in the Bureau's proposal to construct a transmission line. Sierra's president testified that he could not rely upon a single hydroelectric generating source and a single transmission line as a source of supply. He said that standby service from another source would be necessary "to assure anywheres near reasonable service", and that the cost of such standby

[22]

would mean "prohibitive" total cost for the necessary service.[24]

F. Sierra Fails to Produce Any Evidence to Contradict the Commission's Conclusion That PG&E Was the Only Feasible Source of Power to Supply Sierra's Requirements.

The Commission states:

> "Second, we find Sierra's argument that it has foregone other sources of supply in reliance upon the continuance of all terms of the 1948 agreement unconvincing in the light of the record which clearly shows that in 1948 Sierra regarded the other sources of supply as being so unacceptable that PG&E became, in fact, the only feasible source."[25]

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[23] See Sierra's recognition in 1948 of its obligation to serve. R. 209.

[24] R. 208-209, 213.

[25] R. 451.

In all of the seven pages of argument with which Sierra attempts to refute the foregoing statement there is no reference to any evidence whatever which denies that "in 1948 Sierra regarded the other sources of supply as being so unacceptable that PG&E became, in fact, the only feasible source." Sierra has a good deal to say about PG&E's alleged motives, and it has nothing to say about Sierra's motives which would seem to be the actual subject of the proposition. Since the testimony on behalf of Sierra is so unequivocally clear that it did not want Bureau power, even at bargain prices, counsel for Sierra is obliged to brush it aside on the ground that the statements emphasized only part of the facts and in effect were mere self-serving declarations.[26] The fact of the matter is that Sierra's officers knew as well as anybody that they could not get power from the Bureau, either by wheeling or by construction of a power line, in time to meet their needs. Nor, as we have already

pointed out, could construction of a plant by Sierra have been completed in time to meet its needs.

G. Sierra's Argument About PG&E Motivation Is Plainly Invented.

Sierra's argument is based entirely on the proposition that because PG&E for its own internal purposes made a study of cost and revenue combinations in connection with the Bureau's unaccepted wheeling proposal, the Commission should therefore have disregarded everything else in the record.

It is absurd, of course, to think that the cost of service can be changed by making a different kind of cost study.

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[26] Respondent's Brief, pp. 58 and 59.

Only counsel for Sierra would have the imagination to argue as though the cost of service to Sierra depended upon what figures Mr. B. B. Beckett or anybody else wrote down in a cost study.

What counsel for Sierra ignores and should in fairness have advised this Court is that PG&E made a detailed cost study some months previously and developed the amount by which service to Sierra at the rate then proposed by PG&E would fall short of producing a 6% return. This was a cost study based on the actual fact that Sierra was supplied from PG&E's integrated system. Mr. Beckett's study was based on the hypothesis that only Shasta power was used to supply Sierra, and consequently his study produced a purely hyopthetical result. The Commission was therefore quite justified when it said:

> "Furthermore there is no warrant for the Commission to adopt a method of determining cost of serving a particular customer from an integrated electric power supply system which considers only the cost of energy from a single source of power on that system."[27]

That Sierra would have agreed with the Commission in 1948 is shown by the fact that Sierra's president then testified before the California Public Utilities Commission that his company was relying on the 75 diversified generating plants connected to PG&E's system and not on any single source of power.[28] A witness for PG&E in the same proceeding testified that Shasta power would be part of PG&E's power pool and that some Shasta power would undoubtedly find its way to Sierra but no one could say how much.[29]

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[27] R. 455, note 10.

[28] R. 210.

[29] R. 203.

Further, it is clear that the hypothetical costs under a wheeling arrangement were not the basis for fixing the rate which was offered Sierra. The rate to Sierra was substantially in excess of those hypothetical costs and would obviously have produced a return materially in excess of the 6% on the capital there assumed.

H. Sierra's Attack on the Commission's Conclusion That the Rate of Return Under the New Rate Is No Higher Than the Rate of Return Anticipated Under the Contract Is Entirely Unwarranted.

If the rate of return under the new rate for Sierra does not exceed the rate of return which was anticipated under the old rate it is clear that the increase in rate is equivalent to the increase in costs over those anticipated. The Commission's inquiry to the parties asking what rate of return was foreseen or reasonably foreseeable by PG&E at the time it made the contract was evidently intended to develop whether this equivalence between the increase in the rate and the increase in costs actually existed. Consequently, in endeavoring to answer the Commission's inquiry PG&E referred to the study of actual costs to serve Sierra from its integrated system.[29a] As we have said, this cost study found the actual cost of serving Sierra on the basis of a 6% rate of return. This cost was compared with revenues under the then proposed rate to find the deficiency in revenue below cost of service. There is no doubt that the amount by which this deficiency would be increased by reason of the reduction in revenue due to proposal of the P-31 rate was a simple matter to determine and was known to PG&E man-

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[29a] See testimony of Mr. John F. Roberts, R. 67 *et seq.*

agement at the time of the final negotiations. The Commission rightly rejected on the basis of common sense Sierra's attempted inference that Mr. Beckett's hypothetical study was the sole information on which PG&E acted.

In order to show what PG&E's actual cost study meant in terms of rate of return as requested by the Commission, it was a simple matter to relate these cost figures to the appropriate amount of capital. In brief, PG&E not having an "actually foreseen" rate of return presented the cost figures that were actually known so as to show the "reasonably foreseeable" rate of return.

Contrast with this the study which Sierra would have this Court believe is the answer to the Commission's question. In the first place, it does not develop a rate of return, and no one can tell from the figures in its study what rate of return was foreseeable under the P-31 rate proposal. We can say with certainty that it must have been more than 6% because the revenue exceeds the cost with return assumed at 6%.

Sierra unsuccessfully tried to persuade the Commission to accept a study which was based upon a purely hypothetical allocation of Shasta power, a study which did not even give an answer to the question which the Commission asked. On the other hand, PG&E's study was based upon actual cost estimates from which it was possible to develop

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on a rational basis the reasonably foreseeable rate of return. The PG&E study, which occupies pages 356 to 408 of the Record, makes clear the source of the figures and the manner in which they were developed. The Commission's acceptance of their soundness was fully justified.

In view of all the argument by Sierra over this matter of cost studies it might be supposed that Sierra thought that the hypothetical wheeling cost study would show that the 1948 contract specified rate was still reasonable in 1952. As a matter of fact, even by this test the Commission showed that the contract specified rate was unreasonable.[30] Sierra fails to comment on this.

I. The Evidence Actually Shows That It Was Understood That the Purpose of the Term of the Contract Was to Protect PG&E's Investment.

The direct and positive evidence of the contract itself and the virtually contemporaneous statements in the 1948 hearing before the California Commission prove that the purpose of the 15-year term was protection of the new investment in a 100,000 volt transmission line.

Two prior contracts, each of which called for a new transmission line, had 15-year terms. PG&E's first proposal to Sierra in 1947 was for a new line and a new 15-year term. The 15 years was accepted without discussion throughout the negotiations and without relation to the rate.

It is significant that the contract relates the 15-year term to the completion of the new 110,000 volt line and requires a new 15-year term to begin when a second such line is completed and placed in operation to meet Sierra's requirements.

When to this internal evidence of the contract is added the statements of both parties made before the present

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controversy arose there can be no doubt that the term of the contract was intended to protect their respective investments. As to the reason for the 15-year term, Mr. Pollard testified for PG&E before the California Commission in 1948:

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[30] R. 455.

> "Well, of course, that was—on our part was in order to guarantee that we would have business for a long enough period of time *to warrant us in making the investment* in the cost of the new line and amortizing it. And, furthermore, followed the same pattern as previous contracts we have had in each of which instances a substantial investment was made for service of this customer. And, similarly, 15-year contracts were taken at each of those times for that reason."[31]

In the same proceeding Sierra's president testified on the necessity for a 15-year contract as follows:

> "When load conditions are such that you have to have additional capacity it might be that that additional capacity could be arranged to carry you over for a short period—be sufficient to carry you over for a short period, but in case where you have to go to a relatively large investment it is only fair and business—proper business that the Company you are negotiating with *gets a proper return on the investment for that period*. That is the basis upon which we would operate ourselves, we would not expect anybody to go to a large investment which is necessary in order to give the Company capacity they need for any shorter period than that."[32]

In cross-examination, Sierra's president further said:

> "Q. This contract effectively ties Sierra's hands for 15 years, will it not?
>
> A. In what way do you mean?

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[31] R. 200, emphasis supplied.

[32] R. 207, emphasis supplied.

> Q. Well, because of the fact that you are prohibited from developing any further power facilities of your own?
>
> A. No, I do not think that is true. The contract is worded in that way, if the parties have a modification that is justified I think the parties can get together on it. In other words, only the—the principal thing that the selling party would have—I might be corrected on this if I am wrong from P.G.&.E. Company—would be idle investment. In other words, if we had a development that we found feasible and it came in at a time when any investment was [not][33] made idle by the P.G.&E. in other words, at a time when they might have to put in additional investment even to serve it, it would not penalize P.G.&E. if we went ahead on it and we could make arrangements with them to do so."[34]

In other words, Sierra believed that PG&E's primary concern was its investment and that a modification of the contract for Sierra's benefit would be justified under any circumstance where PG&E's investment was protected. If Sierra's president had exhibited the same reasonable attitude which he expected from PG&E in 1948 toward PG&E in 1952 when requested to renegotiate the present rate in accordance with the order of the California Commission[35] this proceeding would doubtless have been unnecessary.

In the present proceeding in 1953 Sierra's president testified that in his 1948 testimony before the California Commission he gave all the reasons which he could think of in support of the contract. The transcript of that proceeding will be scanned in vain for any indication that PG&E intended to give up any right to initiate a rate increase or that Sierra ever had any such understanding. Are we to

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[33] The context requires insertion of the "not" at this point.

[34] R. 216.

[35] R. 61, 283, 285.

believe now that it was mere oversight that when the 15-year term was mentioned in 1948, Sierra's president thought only of a proper return for PG&E's investment rather than a guaranteed rate for Sierra, even though he was obviously looking for reasons to satisfy his Nevada opposition?

Not quite two years later, before the California Commission in 1950, Mr. Moulton, PG&E's vice president and executive engineer, explained the difference between the 15-year term of the Sierra contract and the 5-year term of other resale contracts as follows:

> "We finally made a 15-year contract with Sierra Pacific. *We made a longer contract because we under-[took]*[36] *to build an additional line* to supply them and *we felt we needed that protection of a long contract.*"[37]

Even in 1952, after Sierra had determined to oppose any increase by PG&E, Sierra's president before the California Commission on cross examination testified as follows:

> "Q. Is it not a fact, Mr. Tracy, that Pacific Gas and Electric Company was insisting on a 15-year contract in order to protect it in a very large investment that it had to make in facilities in order to bring power to the

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[36] The text has "understood" at this point, clearly a reporter's error.

[37] R. 273. Emphasis supplied. This testimony also shows that Sierra is completely mistaken in interpreting Mr. Moulton's testimony as support for its position that the contract rate could not be changed. Mr. Moulton recognizes that the purpose of the 15 year term was to protect the new investment. This testimony was given within a few months after initiation of service over the new 110,000 volt line to Sierra, and the fact that an increase was not deemed warranted at that time does not constitute a bar to an increase under conditions of greatly increased cost.

> summit to supply to the Sierra Power Company?
>
> A. I think that works both ways. Yes, our company wished to have a firm contract too to cover our investment." (Ex. 23, pp. 1418, 1419)

In the same proceeding Sierra's president also testified as follows:

> "Q. Now do you have any question in your own mind as to the right of this Commission to change or modify the terms of contracts made between a public utility and one of its customers?
>
> A. It is my understanding that the Commission has jurisdiction over rates, yes, sir.
>
> Mr. Orrick. I didn't hear that answer. Would you read that back, please? (Record read.)
>
> Mr. Duval. In having jurisdiction over rates, it can increase or decrease the rates, would you agree with that?
>
> A. I presume that."[38]

Protection of investment is not accomplished by ignoring diminishing returns. Failure to allow a fair return on property devoted to public utility service is confiscation of that property. To argue that PG&E consented to possible loss of all return for up to 30 years on a new investment in excess of one million dollars is absurd and contrary to the express testimony.

J. The Adoption of Schedule P-31 Charges Does Not Support Sierra's Contention That the Rate Was to Be Fixed for the Contract Term.

When the present contract was being negotiated with Sierra in 1947 and 1948 PG&E had on file with the California Commission two tariffs of general application for intra-state resale electric service to customers who purchased all of their energy requirements from PG&E. One of these, Schedule P-31,[39] offered a rate approximately 10% below the other to resale customers who would enter into a five year contract for service. The contract with Sierra did

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[38] R. 329.

[31]

not incorporate the P-31 rate as such. It simply provided a schedule of demand and energy charges equivalent to those in effect under the P-31 tariff, plus a stand-by charge, and incorporated certain of the conditions of that tariff.

Sierra would argue first that the P-31 rate was established as a fixed rate for the term of each five-year contract and therefore that the Sierra rate is a fixed rate for the 15 to 30 year term of its contract. We have already shown that the conclusion does not follow because the 15 year term was proposed for protection of the new investment long before the P-31 rate entered into the negotiations. The premise that the P-31 rate could not be changed is equally unsound.

The California Commission has twice increased the P-31 rate since its adoption in 1945. The first occasion was in 1950 in response to PG&E's application for a 6% rate increase. The second occasion was in 1952 when the California Commission superseded Schedule P-31 by Schedule R, which is equivalent to the rate proposed in this proceeding. In each of those cases the Commission excepted from the increase certain named customers but the balance were required to pay the increased rate beginning with the effective date of the general increase regardless of the fact that they were being served under term contracts.[39a] This is convincing evidence that the California Commission does not regard the P-31 rate as immune from changes when required by increases in the cost level.

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[39] R. 299.

[39a] As to the 1950 increase of 6%, Exhibit 18 shows that Pacific requested an increase in each of its filed schedules and was authorized to make such increase effective for service from April 15, 1950

The testimony of PG&E's rate engineer in 1945, to the effect that users of the P-31 rate were assured of the lower rate for a five-year term (quoted by Sierra in its brief at pp. 31, 49), sounds impressive when isolated from its context. We believe, however, that a study of the record of that proceeding will show that Mr. Beckett meant "lower than the P-6 resale schedule" and that he did not have in mind a fixed rate regardless of cost considerations. In any event the California Commission has set the matter at rest by granting the increases above described.

K. Sierra Did Not Negotiate on the Basis That an Alternative Source of Power Was Actually Available.

Sierra never did act like a buyer playing one competitor against another. In October of 1947, Sierra's president explained to PG&E that his company was not prepared to continue negotiations, that there was local political pressure

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subject only to the named exceptions. Pacific estimated that it would received additional revenue of $140,000 annually from resale customers as a result of this increase.

As to the 1952 increase, Exhibit 17 shows that the California Commission authorized cancellation of all existing schedules and transfer of customers to the increased schedules applicable to the service rendered, including Schedule R for resale customers subject only to exception for certain listed contracts.

The exception of Sierra from the 1952 increase was expressly stated by the California Commission to be for the purpose of allowing an opportunity for the parties to renegotiate the contract "in the light of the new basic resale schedule," i.e. Schedule R (Ex. 17, p. 41). The refusal of Sierra to negotiate (T. 988) does not convert this exception into a final disposition of the matter by the California Commission. The matter is pending before that Commission in a new proceeding.

to bring Shasta power into Nevada which *hampered Sierra's* negotiation, and that Sierra could not afford to offend Shasta power advocates.[40] It is evident that PG&E was not given the impression that Sierra found anything desirable in the proposal for Bureau power. Instead, Sierra was making it clear that it was faced with public pressure urging "cheap" government power and ignoring the practical re-

quirements of the situation. The following testimony given by Sierra's president in this proceeding illustrates this point:

> "Q. Mr. Tracy, when Pacific Gas and Electric gave up the fuel escalator clause and submitted the proposed form of contract to you after the agreement on the demand and energy charge, what was your opinion as to why they were willing to give up that clause, which would have tended to protect them against at least one of the larger elements of risk in so long a term contract?
>
> [Objection by Mr. Searls on ground of irrelevancy overruled]
>
> * * * * * * *
>
> A. They did not inform me as to the reason and I certainly would not take it upon myself to guess.
>
> By Mr. Wahrenbrock. Q. Did you think you had outsmarted them on that?
>
> A. No. That isn't the correct answer. We thought that we had showed them sufficient reasons for proposing to us a lower rate.
>
> Q. Namely the threat of taking your load some place else.
>
> A. The potential competition that was *very prevalent. The papers were full of it.* As I testified before,

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[40] R. 340.

> all the groups were active. The Chamber of Commerce had a power committee."[41]

Notice that Mr. Tracy declined to state that he threatened to take his load elsewhere. To him the word "competition" seems to be synonymous with "public pressure" since he stated in his testimony that even after the contract with PG&E was signed and approved by the California Commission, he was bothered by "competition".[42]

In the face of all this evidence, which boils down to the fact that Sierra could not get the power it needed except from PG&E and the fact that any alternative was bound in the long run to mean high but uncertain costs when all factors were taken into account, Sierra's argument that it gave up a bargaining position or that either it or its customers have lost anything by making a contract with PG&E for service at a rate subject to regulatory change is without foundation.

"The papers were full" of competition and it was "very prevalent," but this sort of competition was more of a problem to Sierra than to PG&E. Sierra had no illusions about the desirability of a contract for Bureau power as is demonstrated by the intra-company communications which list Mr. Devore's or Mr. Tracy's objections to such an arrangement.[43]

Sierra was not making fine calculations to determine the cost of various alternatives nor was it trying to extract from PG&E an agreement for an unchangeable rate. The 15-year term was important from the investment standpoint. Sierra endeavored to and did obtain the lowest available rate from PG&E but this was a standard rate, available to qualified resale customers whether or not they had competitive sources of supply.

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[41] Transcript, pp. 937, 938 (not printed).

[42] R. 54.

[43] R. 347-348, 350-351, 353-355.

PG&E undoubtedly felt the effect of the public pressure and concluded that it should offer its standard resale rate, the P-31 tariff, but it did not expect that this rate would be fixed in the face of cost changes.

When called upon at the California hearing in 1948 to justify making the contract with PG&E, Mr. Tracy attempted to educate the public representatives from Nevada to the facts of the situation which Sierra then faced. He

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showed that he really had no choice in the matter. He did not claim that the 15-year term was agreed upon to secure a favorable rate; he explained that it was a necessary protection for the new investments to be made. The public representatives were satisfied with this and withdrew their opposition.

In a few words, neither Sierra nor public opinion were demanding a fixed rate, nothing in the situation required a fixed rate and nothing in the negotiations, the contract, or the explanations of the contract in the 1948 proceeding ever suggested that a fixed rate had been discussd, much less agreed upon.

[36]

CONCLUSION

PG&E's rate for service to Sierra is just and reasonable by the standards of the Commission applied in accordance with the express terms of the Federal Power Act. Sierra's argument for a different procedure and a different result deprives the Commission of a major part of its function as an expert body in the field of rate regulation. In this particular case no fact exists which justifies a court of law in setting aside the Commission's determination, made only after Sierra was given a full and fair hearing. The order of the Court below should be reversed and the Commission's order affirmed.

Dated: November 4, 1955.

Respectfully submitted,

ROBERT H. GERDES
F. T. SEARLS
245 Market Street
San Francisco 6, California

ROBERT E. MAY
WHEAT, MAY AND SHANNON
903 Commerce Building
1700 K Street
Washington 6, D. C.

Attorneys for Petitioner,
Pacific Gas and Electric
Company

Of Counsel:

JOHN C. MORRISSEY
MALCOLM A. MACKILLOP
245 Market Street
San Francisco 6, California

BRIEF AND APPENDIX FOR INTERVENER

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,422

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

SIERRA PACIFIC POWER COMPANY, *Intervener*.

ON PETITION TO REVIEW ORDER OF
FEDERAL POWER COMMISSION

United States Court of Appeals
For the
District of Columbia Circuit

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Joseph W. Stewart
CLERK

WILLIAM C. CHANLER,
LAWRENCE A. BAKER,
40 Wall Street,
New York 5, New York,
Attorneys for Intervener.

Of Counsel:
WINTHROP, STIMSON, PUTNAM & ROBERTS,
J. PHILIP BAHN,
STEPHEN A. WEINER,
40 Wall Street,
New York 5, New York.

Statement of Questions Presented

In the opinion of intervener, the questions presented are:

1. Even if its order were reviewable, was it an abuse of discretion for the Federal Power Commission to refuse to hold further hearings as to the reasonableness of the rate embodied in the contract at bar, when the facts and arguments advanced by PG&E in support of its request for further hearings were sham and frivolous on their face?

2. Did PG&E urge any second alternative ground as to the meaning of the contract before the Commission, and did the Commission refuse and fail to make findings as to any such ground?

3. Were the issues controverted in PG&E's reply brief before the Commission raised, litigated and decided by this Court and the Supreme Court?

4. Did the California Commission order an increase in the contract rate and did Sierra repudiate any agreement to negotiate a new rate?

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,422

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

SIERRA PACIFIC POWER COMPANY, *Intervener.*

BRIEF FOR INTERVENER

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Counter-Statement of the Case

PG&E's brief on the merits is based on two propositions: (1) that the Commission abused its discretion in refusing to hold a further hearing and to make a determination under §206(a) of the Federal Power Act* (the Act) and (2) that the Commission erred in refusing to reopen the proceedings in order "to determine the question left undecided before—i.e., whether the Sierra contract was in fact one for a fixed rate as Sierra had claimed, or one for a changeable rate as Pacific had claimed—so that it could be determined whether, on the *true* facts, §205 or §206 was applicable * * *". (PG&E Br. p. 19.) In our cross-motion to dismiss the instant petition to review on the ground that it is non-appealable, frivolous and sham, filed April 17, 1958 and now pending before this Court, we show:

(1) That as a matter of law, the Commission's refusal to hold a further hearing under §206(a) is not reviewable on appeal. We need not repeat that argument here** and will confine ourselves in this brief to a concise demonstration, in Point I *infra,* that even if the Commission's action were reviewable, it was not an abuse of discretion, but on the contrary, was affirmatively required by the record.

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* Act of August 26, 1935, c. 687, Title II, 49 Stat. 838 *et seq.,* U.S.C.A., Title 16, §824e(a).

** Except to call this Court's attention to the very recent decision of *State of New Jersey* v. *United States,* Civil Action No. 1002-58, U. S. Dist Ct., D.N.J., decided by a 3 judge court on November 25, 1958, and reported in 8 Pike & Fischer Admin. Law (2d) 648. In that case the court held that under a statute providing that "the [Interstate Commerce] Commission shall have authority * * * either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance" of ferry service by a railroad, the decision of the Commission not to conduct an investigation was not judicially reviewable.

(2) That PG&E's claim that "on the *true* facts" it could and did change the contract rate by its 1953 unilateral filing under §205(d) of the Act* is barred by the decision of the Supreme Court in the prior proceedings that "neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra." *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 353 (1956). In our cross-motion and reply memorandum thereon, we show further that PG&E's contention that in the prior proceeding "The F.P.C. had refused and failed to make findings on the contract issue, erroneously determining instead that the issue was immaterial" (Pet. to Rev. p. 10; PG&E Br., App., p. 10), is false because PG&E never requested any such findings and the Commission made no such "determination." We show also that PG&E's further statement that because of the Commission's refusal to make findings "the issue was not presented to the Supreme Court for its determination" (*ibid.*) is equally false, because in the Supreme Court PG&E had filed, with minor editorial changes, the identical reply brief on which it relies as proof that it had raised the issue before the Commission.

In our opinion our demonstration of the foregoing facts and law on that cross-motion conclusively disposes of PG&E's contention that it is entitled to a second hearing in order to establish the legality of the very schedule of increases which was declared unlawful in the prior proceedings. Nevertheless, PG&E's present brief on the merits is devoted almost entirely to an attempt to show that "Pacific has since the very inception of the initial proceeding before the F.P.C. done all it properly could do to have the tendered issue [that there was an agreement outside the written contract that the rate could be changed by a unilateral filing under §205(d)] heard and decided and is still doing all it can toward that end" (PG&E Br. p. 38), and that that question is still "undecided" (*ibid.*).

---

* Act of August 26, 1935, c. 687, Title II, 49 Stat. 838 *et seq.*, U.S.C.A., Title 16, §824d(d).

In this brief we shall show that PG&E's entire thesis that it "tendered" any such issue in the prior proceeding is based upon such a tissue of misstatement and plain falsehood as we believe will find no parallel in the annals of litigation before this Court. When stripped of these misstatements and falsehoods, it will be apparent that even if the supposed "issue" were not barred as a matter of law, it is non-existent as a matter of fact and that PG&E is merely attempting to relitigate the identical issue on which it lost in the prior proceeding:

> "The first question before us is whether PG&E's unilateral filing of the new rate under §205(d), and the approval of the new rate by the Commission under §205(e), were effective to supersede PG&E's contract with Sierra. We think not" (350 U. S. at 352-53).

Summary of Argument

Since the decision of the Supreme Court on the prior proceeding, PG&E has presented a series of arguments and contentions to the Commission and to the courts which are based upon such obvious fabrication and falsification of the facts shown by the record that the conclusion is inescapable they were advanced solely for the purpose of delay.

(1) On its original "motion to reopen" in the present proceeding, PG&E sought solely to persuade the Commission to permit it to present evidence to show that the contract rate was adverse to the public interest under §206(a). But when the Commission granted its request that it be permitted to make a full presentation of the facts and arguments which it proposed to advance upon such a rehearing, it became so apparent that PG&E's contentions were sham and frivolous, if not worse, that PG&E substantially abandoned these contentions and launched upon an eleventh hour campaign to show instead that the very unilateral filing of a schedule of increased rates under §205(d) which had been declared unlawful by this Court and the Supreme Court was nevertheless lawful.

(2) In support of this campaign, PG&E advanced, and reiterated *ad nauseam,* a series of statements as to what took place in the prior proceedings that are such complete and obvious fabrications that it is incredible that counsel should dare advance them before this Court. Apparently PG&E believes in the doctrine that if a falsehood is repeated often enough, it becomes the truth.* In brief outline, its fabricated contentions can be divided into the following subdivisions:

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* In order that the Court may fully appreciate the extent of PG&E's misstatements, we have annexed as an appendix to this brief a "Catalogue of Misstatements" divided into the four categories most often asserted by PG&E. As appears from that appendix, the brief contains 46 misstatements of fact in those four categories alone. References to that appendix will be made from time to time in the course of this brief.

(a) That in the prior proceedings PG&E sought to argue before the Commission "as a second alternative ground" that it had a side "agreement" with Sierra to the effect that, despite the terms of the contract, the rate would be changeable by PG&E. As shown in the Appendix, §1, statements regarding such an agreement appear 15 times in the course of the brief. Yet the record shows that PG&E itself assured the Commission on the prior proceeding that there was and could be no such side agreement varying the written terms of the contract.

(b) PG&E also argues that it advanced its "second alternative ground" in the form of a reply brief submitted before the Commission. The short answer is that PG&E has itself asserted before this Court, quite correctly, that that reply brief did not raise any new point but was devoted solely to rebutting "false" statements of fact advanced by Sierra.

(c) PG&E asserts 14 times during the course of its brief (see App., §2) that the Commission "refused and failed to make findings" as to the factual controversy raised by its reply brief, "erroneously determining instead that the issue was immaterial". The record shows that PG&E never requested any "findings" on its alleged alternative issue. On the other hand, Sierra did request findings in support of its version of the facts controverted by PG&E, and the Commission resolved such factual questions in PG&E's favor.

(d) Seven times in its brief PG&E asserts that, because of the Commission's refusal and failure to make findings on its so-called "contract issue" and because it prevailed before the Commission on an alleged "other ground", it could not, as the prevailing party, raise before the courts the issues controverted by its reply brief (see App., §3). The briefs before this Court and the Supreme Court show that Sierra argued in both Courts that the Commission's findings and refusals to find were arbitrary and contrary to the evidence, and that PG&E argued that they were fully supported by the evidence *and expressly urged this Court to sustain them.* The opinions of this Court and the Supreme Court further show that the issues thus tendered and litigated were resolved in Sierra's favor by those courts.

(3) PG&E's case rests primarily upon an affidavit by its President, Mr. N. S. Sutherland, asserting that he and Sierra's President, Mr. Frank Tracy, entered into an oral agreement at the time the contract was entered into, to the effect that despite its terms it would be subject to change. An examination of the affidavit will disclose that, despite its ambiguous verbiage, it says no more than that Mr. Tracy agreed that the contract was subject to change by the appropriate regulatory commission, which has been Sierra's position from the outset of this litigation. The record further shows that PG&E's statements, appearing 11 times in the course of its brief (App., §4), to the effect that the California Commission has found the contract rate unreasonable and that Sierra repudiated both its alleged agreement with Mr. Sutherland and an alleged "representation" to the California Commission that it would negotiate a new rate, are completely false. The order of the California Commission conclusively establishes that that Commission expressly refused to permit PG&E to increase the rate in the contract at bar, as well as those in other term contracts at a fixed rate, without the purchaser's consent. Thus, even if Mr. Sutherland's proffered testimony were admissible, it would not support PG&E's contention.

Thus it is apparent that even if PG&E's present contentions had any validity as a matter of law, they have not a shred of basis in fact.

We submit also that the obvious falsity of PG&E's entire presentation indubitably establishes that it was designed and advanced solely for the purposes of delay, and that PG&E should be assessed double costs and damages pursuant to Rule 23 of the Rules of this Court.

POINT I

Even if the Commission's decision terminating the proceedings under §206(a) were reviewable on appeal, it would have to be affirmed because the proof offered by PG&E to show that the contract rate adversely affected the public interest, as well as PG&E's assertions as to the basis of the Commission's refusal to reopen, are sham and frivolous.

In its original "motion to reopen" before the Commission, filed June 11, 1956, following the Supreme Court's remand, PG&E's sole contention was that the contract should be set aside under §206(a) because the rate adversely affected the public interest in the three respects mentioned by the Supreme Court, i.e., that the rate was "so low as to * * * impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory" (350 U. S. at 355). (Motion to Reopen p. 5; Supp. App. R. 2653.)*

In its answer to that motion, Sierra pointed out to the Commission that at the very time that PG&E was asserting that the contract rate impaired its financial ability to continue its service, it issued a prospectus in support of an offer of some $30,000,000 worth of common stock, in which it assured the public that PG&E was involved in no litigation except that "which is considered routine to the Company's operations" (Supp. App. R. 2677, 2719). Sierra also pointed out that PG&E's statement in its prospectus was undoubtedly correct, since the prospectus showed on its face that the amount involved in this litigation, approximately $500,000 per year, was 7/10 of 1% of PG&E's net income. (Supp. App. R. 2677).*

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* As in PG&E's present brief, references here designated "R. 000" are to pages of the record which are printed in the Joint Appendix in case No. 12,430, while references designated "Supp. App. R. 000" are to pages of the record which, upon agreement with PG&E, will be printed in the Supplemental Joint Appendix in the present case.

That PG&E itself recognizes the preposterous and meretricious nature of its contention that the contract rate impairs its financial ability to continue its service is shown by the fact that in this proceeding it pretends that it never made any such contention. Thus, it tells this Court that it only "offered to establish [before the Commission] that the existing rate was against the public interest under *two* of the tests laid down by the Supreme Court, *viz.,* (1) that the existing rate was so low that it 'cast upon others an excessive burden,' and (2) that it was so low as to be 'unduly discriminatory'." (PG&E Br. p. 43 n. 20) (Emphasis added.) But it is readily demonstrable that PG&E's assertions that the contract rate adversely affects the public interest in these two respects are equally sham and frivolous.

As to PG&E's contention that it had a right to a reopening to enable it to show that the contract rate cast an excessive burden upon its other customers, we need only refer to the California Commission's statement, quoted in this Court's opinion on the prior appeal, "that the special contracts were entered into '* * * *with the clear understanding that [PG&E's] stockholders must bear any burden* * * *.' " *Sierra Pacific Power Co.* v. *Federal Power Commission,* 96 App. D.C. 140, 141, 223 F. 2d 605, 606 (1955) (Emphasis added.) (See R. 1790.) In view of that statement, we find it somewhat surprising that PG&E in its present brief should have the hardihood to assert to this Court that at the time of the prior proceedings the California Commission "had already found" that "the 1948 rate "* * * cast an excessive burden upon other of PG&E's electric utility customers * * *' ". (PG&E Br. p. 20 & n. 13). That PG&E was fully aware as late as December 19, 1955 that a contract such as that at bar would not burden its other customers is apparent from its sworn statement to the California Commission in proceedings seeking approval of a special low-rate contract with the City of Alameda:

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* The Submission which PG&E presented to the Commission also showed that the contract with Sierra covered less than 1% of PG&E's gross electric business of $290,000,000 in 1955 (Supp. App. R. 2903, 2910).

> "* * * said contract * * * *will not constitute a burden upon Pacific's other customers* but will be of benefit and advantage to said other electric customers and to the public generally" (Supp. App. R. 2737). (Emphasis added.)

In answer to PG&E's contention that the contract rate is unduly discriminatory as to "Pacific's only other interstate customer, California-Oregon Power Company" (COPCO) (PG&E Br. p. 44), Sierra pointed out to the Commission that COPCO, unlike PG&E, had a statutory right to file a complaint under §206(a) if it believed it was discriminated against. (Supp. App. R. 2974-77.) Thereafter, the Commission specifically invited COPCO by letter to apprise it "of any * * * adverse effects" which COPCO or its customers incurred as a consequence of PG&E's continued service to Sierra at the contract rate (Supp. App. R. 3072-73), and COPCO replied to the Commission that "this Company is not aware of any effect upon its electric customers of the particular rates and charges at which PG&E may furnish service to Sierra" (Supp. App. R. 7802).

We submit that, in the face of the foregoing record, it would have been an abuse of discretion for the Commission to hold further hearings under §206(a) in order to afford PG&E an opportunity to attempt to show that the contract rate was against the public interest. It follows that even if the Commission's refusal to hold such hearings were reviewable on appeal, the Commission's order would have to be sustained on the ground that PG&E's factual submissions in support of its request for a reopening were sham and frivolous.

Because its §206(a) contentions are without substantive merit, PG&E* relies in its brief in this Court on two procedural claims: first, that the Commission denied PG&E an adequate opportunity to show that the contract rate adversely affects the public interest, and second, that the Commission made such a "finding" of potential public harm from the contract rate as to require a formal hearing under §206(a).

The first of these procedural claims constitutes PG&E's "indictment" of the Commission on the ground that "in a rather abrupt and astounding fashion" it "refused to hear any evidence on this new issue," and "never permitted the presentation of pertinent evidence and testimony upon which it could bring its expert judgment to bear" (PG&E Br. pp. 41, 42, 44). That such "indictment" is ludicrous is fully demonstrated in PG&E's own Supplemental Memorandum on Jurisdiction and Procedure filed in this Court on October 2, 1958. As PG&E there points out:

> "On September 7, 1956, the Commission [at PG&E's express request (Supp. App. R. 2810, 7814-15)] entered an order * * * permitting both parties additional time within which to file written submissions as to the factual and legal bases for their respective contentions.
>
> "* * * *Statements of fact and argument were thereafter filed by both parties, covering all issues raised*

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* Which admitted *to the Commission* that "[i]t is equally clear that the nature of the further proceedings was left [by the Supreme Court] to the discretion of the Commission" (Supp. App. R. 2779).

> *in the consolidated proceedings.*" (pp. 5-6) (Emphasis added).

As the record shows, PG&E filed a total of 227 pages of submissions, motions, memoranda, and exhibits in support of its request to reopen (Supp. App. R. 2649-54; 2778-2809; 2817-23; 2824-2919; 3026-62; 3094-3143). Clearly, it has had its day in court.

The second of PG&E's procedural claims rests solely on its allegation that, in the order under review, the Commission made a "finding that the rate under examination *may in fact adversely affect the public interest within the very standards just laid down by the Supreme Court*" (PG&E Br. p. 45). This, of course, is nonsense. The Commission's actual "finding" was "that no useful purpose would be served by any further proceedings before the Commission at this time, as requested by PG&E, with respect to past or current adverse effects of the 1948 rates upon the public interest" (Supp. App. R. 3080). The Commission's conclusion to this effect (expressly based on the Supreme Court's opinion, PG&E's elaborate submissions of facts and argument, and the Commission's own expert judgment) was arrived at because, as the Commission put it, PG&E sought to establish only that "the cost of rendering the Sierra service exceeds revenues therefrom"—a "subsidiary fact" which "may or may not * * * adversely affect interests of public concern; the *ultimate fact* to be ascertained" (Supp. App. R. 3079). The Commission thus reiterated the holding of the Supreme Court in this very case that "a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility" (350 U. S. at 355). It is a mark of desperation that PG&E should seek to distort this reiteration, leading to a conclusion that "*no useful purpose* would be served by any further proceedings," into a "finding" that the public interest "may in fact" be adversely affected.

Moreover, PG&E neglects to mention that the Commission took up its offers of proof in detail and found that "PG&E does not offer nor does it propose to offer any support for" its contention that the contract rate is in fact so low as to adversely affect the public interest, which was of course "the ultimate fact" at issue (Supp. App. R. 3079-80).

POINT II

There is not a word of truth in PG&E's assertions that it advanced a "second alternative ground" before the Commission relating to an "agreement" between the parties as to the "meaning of the contract," that the Commission "refused and failed" to decide that question, or that any factual issue urged by PG&E was left open by the Commission and not presented to or resolved by the Courts.

PG&E's first Question Presented reads as follows:

> "1. Where an administrative agency decides a case in favor of party P by finding in P's favor on one ground, but *refuses to find whether P should prevail on a second alternative ground* urged by P, and the agency is then reversed as to the one ground on an appellate review brought by S (the losing party before the agency), may the agency on remand consider *whether P is entitled to prevail on the alternative ground originally urged?*" (Emphasis added.)

The short answer is that P never "urged" any "second alternative ground." As this Court will no doubt recall, the ground on which PG&E prevailed before the Commission but lost both in this Court and the Supreme Court was its contention that, because both by the terms of the contract and as a matter of law the contract rate was subject to change by the Commission, it followed that it was also subject to change by a unilateral filing of a new schedule by PG&E under §205(d). It is readily demonstrable that PG&E's present assertions that it also urged "a second alternative ground" as to a "side agreement" in support of its alleged right to change the rate without Sierra's consent and that the Commission refused "to find whether P should prevail" on that ground, "erroneously determining instead that the issue was immaterial" (Pet. to Rev. p. 10; PG&E Br., App., p. 10), are false from beginning to end.

A. PG&E's Entire Contention Regarding a "Second Alternative Ground" Is an Obvious Afterthought, Devised in Desperation After It Became Apparent that PG&E Could Not Prevail on Its Contention that the Contract Was Against the Public Interest.

The first suggestion that PG&E ever "tendered" a "second alternative ground" before the Commission is contained in PG&E's Supplemental Motion for Reopening and Further Hearing filed with the Commission on October 15, 1956 (Supp. App. R. 2817), the very day its "submission" in support of the "motion to reopen" was due, four months after it had filed the original "motion to reopen" and make findings under §206(a), and over two years after the termination of the prior proceedings before the Commission.

As we have seen, PG&E's original "motion to reopen", filed June 11, 1956 (Supp. App. R. 2649), was based *exclusively* on its contention that the contract was against the public interest under §206(a). That PG&E had not even thought of the existence of a "second alternative ground" under §205(d) even a month prior to the filing of its supplemental "motion" on October 15 is apparent from its reply to Sierra's answer to its "motion to reopen" filed on September 6, 1956 (Supp. App. R. 2778). For as an exhibit to that reply (which is also directed exclusively to the §206(a) issue), PG&E annexed a copy of a motion to stay which it had filed on August 2, 1956, in the District Court for the Northern District of California, Southern Division, where Sierra had brought an action for restitution. In that motion to stay, after arguing to the District Court that the action for restitution should not be heard until after there had been a determination by the Commission on the §206(a) issue, PG&E assured the District Court that *"of course, if the rate was not against the public interest, restitution will be allowed"* (Supp. App. R. 2796). (Emphasis added.)* PG&E's motion to stay was granted, and is still in force.

We think the conclusion is inescapable that PG&E dreamed up its contention as to a "second alternative ground" at the last moment, after it realized that it could not draft even a plausible "submission" in support of its contention under §206(a).

Turning now to the "second alternative ground" itself, the Court will observe that in its brief, PG&E blows hot and cold as to what that ground is supposed to have been.

(a) At times it asserts that *"it had argued to the Commission that facts existed* which showed the parties had *agreed* to use the P-31 rate in the contract and had *agreed* that the rate in the contract would therefore change, upward or downward, whenever the P-31 rate, on file with the California Commission, was found to be unreasonable, as the California Commission had just found a few months before the initiation of the F.P.C. proceeding."* (PG&E Br. p. 26 n. 15) (Emphasis added). But the only evidence of any such "agreement" anywhere in the record is the affidavit of Mr. Sutherland, PG&E's president, executed on August 7, 1957, three years after the original proceedings before the Commission had terminated, to the effect that he and Mr. Tracy (Sierra's president) had agreed that despite the absence of any such provision in the contract, it would be construed as changeable whenever the California Commission changed the P-31 schedule. (Supp. App. R. 3138-43.) As we show later, in its opening brief PG&E (quite correctly) assured the Commission that there was and could have been no such "side agreement" varying the terms of the contract.

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* As we show at pages 15-16 of our cross-motion to dismiss, PG&E gave the same assurance to the Supreme Court shortly after that Court's decision in the prior case.

(b) At other times in its present brief, PG&E merely points out that Sierra had argued before the Commission that, because the contract had been entered into in order to meet a competitive condition, it was understood by all that the rate was intended to remain fixed for the duration of the contract, and that PG&E had taken issue with this contention, urging in its reply brief that there had been no competitive situation and that the contract was understood to be subject to change by the Commission. This is substantially accurate. But it also defeats PG&E's entire contention. For the record affirmatively establishes that the reply brief on which PG&E relies (see PG&E Br. p. 16) was filed solely in rebuttal of an alternative second contention advanced by Sierra, and not as the presentation of any alternative contention by PG&E itself.

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* References to such an "agreement" appear 15 times in the brief. See App. hereto, §1.

B. PG&E's Own Opening Brief in the Prior Proceeding Before the Commission Establishes the Falsity of its Repeated Assertions that it Raised a "Second Alternative Ground" in that Proceeding as to a "Side Agreement" that the Contract Rate Could be Unilaterally Changed by PG&E.

The record of the prior proceedings either before the Commission or before the Courts will be searched in vain for a single reference to any "agreement" between the parties to the effect that the contract rate could be unilaterally changed by PG&E either whenever the P-31 rate was changed by the California Commission or under any other circumstances.* The only evidence of such an agreement anywhere in the record is Mr. Sutherland's belated affidavit, in which he swears that he and Mr. Tracy, Sierra's president, agreed that despite the plain language of the contract, it was understood that the rate could be so changed (Supp. App. R. 3138-43).** That PG&E never contended in the prior proceedings that there was any such "side agreement" could not be more conclusively demonstrated than by its own statement at page 21 of its opening brief before the Commission:

> "1. THE AGREEMENT OF THE PARTIES IS TO BE DETERMINED FROM THE SERVICE CONTRACT ITSELF.
>
> As the foregoing outline indicates, the present service contract was the fruit of a long period of discussion and negotiation involving consideration and balancing of a number of factors by each of

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* Aside from PG&E's contention that it had a right to change the rate as a matter of law, which contention was held to be erroneous by this Court and the Supreme Court.

** As we shall show hereafter, even if there had been such a side agreement, which we deny, it would not help PG&E's position since all Mr. Sutherland really says is that Mr. Tracy agreed that the contract could be changed by the appropriate Commission, which Sierra has conceded from the outset, and the record shows that, contrary to PG&E's repeated assertions, the California Commission expressly refused to increase the rate in Sierra's contract, as this Court itself pointed out on the prior appeal (see Point III *infra*).

the contracting parties. The resulting service contract was clearly intended to constitute a final expression of the terms of their agreement. It is familiar law that 'If the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same matter are excluded from consideration whether they were oral or written.' 3 Williston on Contracts, Rev. Ed. 1817 (Sec. 632). Although this principle is commonly given effect under the label of the parole evidence rule, it is recognized that it is a rule of substantive law 'because it deals with the question where and in what sources and materials are to be found the terms of a jural act.' 9 Wigmore on Evidence, 3rd Ed. 77 (Sec. 2425)" (Supp. App. R. 2256).

After further discussion of the parol evidence rule, PG&E concludes, at page 23, that *"the agreement was embodied in the service contract and neither party would be bound by prior statements or commitments."* (Supp. App. R. 2258) (Emphasis added.)

Sierra of course is and at all times has been in full agreement with the foregoing proposition. As the Court will recall, the contract provides:

> "4. For all electric energy delivered hereunder, Sierra will pay Pacific in accordance with the following schedule of rates * * *" (R. 1552).

Then follows a detailed rate schedule. The contract also provides that it shall remain in force for a minimum term of 15 years (R. 1557), now extended for an additional seven years until 1971 by the construction of a second 110 kw line over the mountains in 1956.* Throughout the prior proceedings Sierra's primary contention was that this constituted a binding contract which could not be changed by PG&E without Sierra's consent—although Sierra throughout conceded that it could be changed by the Commission under §206(a) if the Commission should find on proper facts that the contract was against the public interest.

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* See PG&E's Submission, Supp. App. R. 2852, 2855, 2867; PG&E's Pet. to Sup. Ct. for Cert. pp. 3-4 (reprinted in Supp. App. R.); PG&E's Pet. for Rehearing before the Ninth Circuit pp. 4, 26.

PG&E's "basic" (and only) affirmative contention in the prior proceeding, on the other hand, was that because the contract also contained a provision that "this agreement shall at all times be subject to such changes and/or modifications as said [California] Commission may from time to time direct in the exercise of its jurisdiction", which provision "merely stated what the law would hold in any event", it followed as a matter of law, as well as under the terms of the agreement, that PG&E could increase the rate by the unilateral filing of a new schedule under §205(d) of the Act. (PG&E Opening Brief before Comm. pp. 21-23; Supp. App. R. 2256-58).*

An examination of PG&E's briefs before the Commission and the Courts in the prior proceeding will show that that was the sole affirmative contention PG&E ever raised. But in any event we submit it is clear from the foregoing that PG&E's insistence in its opening brief before the Commission that there was and could be no "side agreement" that the contract would be construed as having a meaning different from its plain language conclusively establishes the falsity of PG&E's present contention that it "tendered" a "second alternative ground" before the Commission based on the existence of such an "agreement".

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* As is apparent from an examination of pages 21-23 of PG&E's opening brief (Supp. App. R. 2256-58), it was so confident of the correctness of this proposition that it erroneously assumed that Sierra must be attempting to show by parol evidence that the parties had a contrary understanding. Hence its insistence that there was and could be no side agreement varying the terms of the contract. As to what Sierra was actually contending, see Point II C *infra*.

C. PG&E's Assertion that it Raised a "Second Alternative Ground" as to the "Meaning of the Contract" in its Reply Brief Before the Commission is Equally False. It was Sierra, and Not PG&E, Which Raised a "Second Alternative Ground" Before the Commission: That Regardless of the Legal Validity of the Contract, the Factual Circumstances Surrounding its Execution Were Such that Equity and Public Policy Required that it be Upheld. PG&E's Reply Brief Was Devoted Exclusively to an Attempt to Rebut that Contention.

In order that the Court may fully appreciate the meretricious nature of PG&E's contentions based upon its reply brief before the Commission in the prior proceeding, we think it will be helpful to outline briefly the posture of this controversy at the time those proceedings took place.

The Court will recall that when this case was before the Commission and before this Court in the prior proceeding, there was no precedent for Sierra's basic legal contention that a rate fixed by contract could not be changed without the purchaser's consent by the process of filing a schedule of new rates under §205(d) of the Act. On the contrary, it was at that time the confirmed view of Commission Staff Counsel, as well as many other lawyers practicing before that body, that rate contracts had been outlawed by the Act as they had been by the Interstate Commerce Act, and that, therefore, the rate could be changed under §205(d) despite the existence of the contract. Thus on that purely legal issue Sierra was plowing virgin soil.

On the other hand, Sierra had the precedent of the action of the California Commission in 1952, shortly before the filing of the disputed schedule before the Commission, when that Commission refused to permit PG&E to increase the rate for those of its customers who had fixed-rate term contracts under Schedule P-31 and opposed the increase, expressly including Sierra. This decision was expressly based on the "equity" arising from the fact that these contracts had been entered into for the avowed purpose of meeting competition from the Government installation at Shasta Dam. Thus the California Commission said:

> "In connection with these special contracts, we point out that the applicant, in order to forestall alleged government competition, requested authority from this Commission to enter into said contracts with the clear understanding that its stockholders must bear any burden which the applicant might sustain as a result of the operation of any such contracts. Therefore, equity calls for the treatment which we have accorded to these special contracts." (R. 1790)

Referring expressly to the contract at bar, the California Commission said:

> "The protestant, Sierra Pacific Power Company, makes the point that if conditions are shown to justify a change in the rate, *which conditions it denies have been shown,* then the contract rates might be altered but that such alteration should be made by agreement of the parties and submitted as previous contracts have been for approval by this Commission." (R. 1788) (Emphasis added)

The California Commission's order concluded by refusing to authorize PG&E to increase the rates in the special contracts referred to, including the contract at bar, except through renegotiation with the purchasers —i.e., it permitted no increases without the purchaser's consent (R. 1794-95).*

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* It is incredible that in the presence of such recorded decisions by the Commission—of which PG&E is of course fully aware as they have repeatedly been called to its attention during the course of this interminable controversy—PG&E should still assert that Sierra "requested" the California Commission to permit it to "negotiate" an increased rate, that the California Commission granted the request, that Sierra "agreed" to negotiate and later "repudiated" that agreement. (See Point III B *infra.*)

Accordingly, Sierra determined to urge the Commission, as a "second alternative ground", that even if it did not accept Sierra's contention as to the binding effect of its contract, it should follow the precedent established by the California Commission—i.e., it asked the Commission to reject PG&E's attempt to increase the contract rate as a matter of equity and in the public interest, even though the Commission should be of the view that PG&E had a technical legal right to do so. Thus Sierra's opening brief before the Commission was based upon two points:

> 1. "The contract in question is a legal and binding agreement which cannot be abrogated against the wishes of either party in the absence of proof that its terms have become injurious to the public interest" (Supp. App. R. 2335).
>
> 2. "It is in the public interest that the present contract be maintained in full force and effect, at least as long as Pacific earns more under the contract rate than it would save if Sierra's business were lost or abandoned"* (Supp. App. R. 2351).

In support of this "second alternative ground" Sierra introduced before the Commission, in addition to the foregoing order of the California Commission, transcripts of the testimony and representations of PG&E's own officials on which the California Commission's order was based. For example, Sierra introduced the testimony given before the California Commission by Mr. B. B. Beckett, PG&E's Chief Rate Engineer, when PG&E was requesting its approval of the P-31 schedule to be offered primarily to customers who would enter into contracts for a term of at least five years. Mr. Beckett stated that one of the purposes was to give the purchaser "assurance that he will have service *at this lower rate* for a period of at least 5 years" (Sierra Opening Br. before Comm. p. 31; Supp. App. R. 2319). Sierra also introduced the testimony of J. S. Moulton, PG&E's Vice President and Executive Engineer, shortly after this contract had been approved by the California Commission. In support of PG&E's request that, as competition from Shasta Dam was still a problem, the special contracts should be exempted from a general rate increase PG&E was then seeking, Mr. Moulton stated:

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* This qualification was based on the testimony of PG&E's witness, B. B. Beckett, before the California Commission at the time PG&E was seeking the approval by that Commission of the P-31 schedule, that it was to PG&E's business advantage to retain business rather than lose it, at least as long as PG&E earned more money by continuing the service than it would if the business were abandoned (R. 1591-1600). That standard of course has nothing to do with the legal standard for setting aside a contract under §206(a) as subsequently laid down by the Supreme Court, and was advanced by Sierra only in support of its alternative equitable contention.

> "* * * That goes largely to the fact that the contract [with Sierra] along with the contracts such as with the City of Redding, which you heard something of this morning, were obtained under competitive conditions with those groups in Nevada which were actively interested in trying to get the Bureau of Reclamation to give service to the Sierra Pacific area in Nevada from the Central Valley Project in California. * * * I am very sure that those competitive conditions existed then and that there is still agitation among certain groups in Nevada to get a line and that—
>
> "Q. Do you think there was any reason for the Federal Government building a line over the Mountains to supply that area with electricity in view of the conditions that prevail, as far as the Government furnishing any similar type of energy to the people of California? A. Yes, I do." (Sierra Opening Br. before Comm. pp. 34-35; Supp. App. R. 2322-23.)

Sierra also pointed out that at the same hearing before the California Commission, PG&E's former counsel reiterated that certain P-31 contracts, as well as the contract at bar, had been entered into in order to meet Shasta competition and should therefore be excluded from the general increase which PG&E was seeking. In support of this contention, he argued that "anybody would agree that we would be accused of double dealing repudiation" if PG&E should seek to increase those contract rates (Sierra Opening Br. before Comm. p. 36; Supp. App. R. 2324). In addition, Sierra introduced certain informal longhand studies which Mr. Sutherland himself had made just prior to PG&E's offer of the P-31 rate to Sierra (R. 2081-86) which conclusively show that the 15-year contract at the P-31 rate had been offered by him in order to induce Sierra to continue to purchase its power from PG&E and reject the offer of the Bureau of Reclamation. (See note *, page 35 *infra.*)

Finally, Sierra offered evidence that, because PG&E had tied up all available Shasta power by wheeling agreements, etc., Sierra no longer enjoyed the competitive position it had relied on when it accepted the 1948 contract (Sierra Opening Br. before Comm., pp. 38-40; Supp. App. R. 2326-28).

On the basis of this evidence, which one would have thought PG&E was hardly in a position to controvert, Sierra argued that, regardless of the legal validity of a rate contract under the Act, it was obvious from the circumstances under which the contract was entered into, and was understood by all that the rate was intended to remain fixed for the duration of the contract, unless set aside by the Commission on proper findings under §206(a).* Accordingly, Sierra urged the Commission to reject PG&E's attempt to increase the rate as a matter of equity and public policy, as the California Commission had done, even though the Commission believed (as it erroneously did) that Sierra's contract was not legally effective. (Sierra Opening Br. before Comm., p. 63; Supp. App. R. 2351).

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* It was this contention which PG&E erroneously characterized in its opening brief as an attempt by Sierra to vary the terms of the written contract by parol. (See pp. 16-18, *supra*).

In answer to these contentions, PG&E filed its reply brief, in which it did attempt to controvert the prior testimony and statements of its own officials (Supp. App. R. 2414-42). But as PG&E at long last admits, it was solely in "rebuttal" of Sierra's contentions (and therefore not as the proffering of a "second alternative ground"), that PG&E filed that brief:

> "Pacific's entire closing brief before the Commission was, in fact, devoted to rebutting Sierra's contention that the rate in the contract was meant to be 'fixed' for the life of the contract." (PG&E Br. p. 16).

Similarly, in its Memorandum in Opposition to Sierra's Motion to Dismiss, filed before this Court on May 2, 1958, in answer to our contention that whatever arguments PG&E had advanced before the Commission had been presented before the Supreme Court where, in relevant part, this identical reply brief was also filed, PG&E said:

> "Contravention in its closing brief of erroneous statements of 'fact' in Sierra's briefs in that proceeding can hardly be called the presentation by PG&E of a legal question to the Supreme Court" (p. 21 n. 6).

Thus PG&E has in effect conceded that no "second alternative ground" was advanced before the Commission by it in its reply brief. The only "second alternative ground" advanced before that body was that advanced by Sierra. And as we shall see in a moment, the majority of the Commission resolved the statements of fact advanced by Sierra and controverted in PG&E's reply brief in PG&E's favor, and, accordingly, refused to uphold the contract on the basis of Sierra's alternative equitable ground—although two Commissioners accepted Sierra's version of the facts and voted to sustain its equitable contention.

So much for PG&E's assertion that it "urged" a "second alternative ground" in its reply brief before the Commission.

D. PG&E's Statement that the Commission "Refused and Failed to Make Findings on the Contract Issue, Erroneously Determining Instead that the Issue was Immaterial", Is False. While PG&E Requested No Findings on the Issues Tendered by Sierra and Controverted in PG&E's Reply Brief, Sierra Did, and the Commission Resolved Every Such Issue in PG&E's Favor.

As we have already pointed out, PG&E requested no findings whatever from the Commission as to what it now calls its "contract issue". On the contrary, with one exception,* its requests to find, which are contained in the reply brief on which PG&E places such reliance (Supp. App. R. 2441-42), related solely to its contention that regardless of the contract it had a legal right to increase the rate under §205(d), under which the only issue is whether the *new* rate is not unreasonable, discriminatory or otherwise unlawful. Thus it is utterly false for PG&E to assert, as it repeatedly does,** that the Commission "refused and failed to make findings on the contract issue" assertedly "tendered" by PG&E, or determined that any such issue was "immaterial" (Pet. to Rev. p. 10; PG&E Br., App., p. 10).

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* PG&E also requested a finding that the contract rate was unreasonably low, in an evident effort to counter Sierra's request that the Commission find that it was not so low as to be against the public interest under §206(a). It is true that the Commission found *this* contention immaterial and made no findings, but that is the ground on which it was reversed by the courts and the matter remanded for "such further proceedings * * * as the Commission may deem desirable." (350 U. S. at 355.)

** Such statements appear 14 times in PG&E's present brief. See App. hereto, §2.

On the other hand it is equally false for PG&E to assert that the Commission made no findings as to the facts regarding the existence of competition, etc. which were asserted by Sierra and controverted by PG&E in its reply brief, or that the Commission "assumed" such facts "did exist, but ruled they were not of legal significance" (PG&E Br. p. 26). For, unlike PG&E, Sierra *did* request full and complete findings of fact in accordance with its alternative contention that because of the disappearance of the competitive advantages under which Sierra had negotiated the contract, it would be inequitable and against the public interest to permit PG&E to increase the contract rate even if it had a legal right to do so. (Supp. App. R. 2357-60). As is quite apparent from an examination of the Commission's order in the prior proceedings (R. 2583 *et seq.*) the Commission not only refused to make any of the findings requested by Sierra on these factual issues, but affirmatively found against Sierra's contentions. For example, the Commission said:

> "Second, we find Sierra's argument that it has foregone other sources of supply in reliance upon the continuance of all terms of the 1948 agreement unconvincing in the light of the record which clearly shows that in 1948 Sierra regarded the other sources of supply as being so unacceptable that PG&E became, in fact, the only feasible source." (R. 2591).

Having found that the facts on which Sierra's alternative equitable contention was based were non-existent, the Commission of course refused to follow the precedent established by the California Commission, expressly pointing out that that determination was not binding upon it (R. 2591). On the other hand, it should be noted that the two dissenting Commissioners accepted

Sierra's factual contentions in large part, and accordingly accepted also the conclusion Sierra sought to draw from those facts:

> "In vernacular terms, PG&E * * * having made its bed, should be required to lie in it,—absent some showing of harm to the public interest if this axiom were followed." (R. 2614).

On the legal issue the Commission also held directly against Sierra's contentions. Here again it is erroneous to assert, as PG&E repeatedly does, that the Commission determined that it was "immaterial" whether or not the contract provided for a fixed rate. For example, it held:

> "First, we cannot accept Sierra's premise that because the *1948 contract rate* was negotiated under competitive conditions, that rate necessarily remains just and reasonable. *For it has long been established that a public utility cannot by contract place its rates beyond the reach of regulation by public authority*" (R. 2590) (Emphasis added).

Moreover, nine pages of the majority's decision deal with nothing but the legal right of a utility to change a fixed rate contract under §205(d) (R. 2598-2606). For example, the Commission says:

> "Indeed, even a cursory examination will show that the provisions of Section 205 expressly authorize the alteration of contracts" (R. 2601).

And again:

> "We think that the conclusion that there is no legally enforceable contract rate after the seller's filing of a new schedule has become effective * * * necessarily follows from the language of the Supreme Court in *Montana-Dakota U. Co.* v. *Northwestern P.S. Co.,* 341 U. S. 246, 251" (R. 2603).

Thus PG&E was quite right when it said at page 44 of its opening brief before the Supreme Court:

> "The Commission's decision in this case was based on the conclusion that no special effect should be given to *the fact that the rate to be increased was embodied in a contract.*" (Emphasis added.) (Reprinted in Supp. App. R.)

In the face of this record how can it possibly be said, as PG&E now repeatedly does in its brief and petition to review, that the Commission merely "assumed" that the contract provided for a fixed rate?

In any event there can be no doubt that PG&E's repeated assertions that the Commission left the issues controverted by it in its reply brief "undecided", "erroneously determining" that they were "immaterial," are flatly contradicted by the record. Equally false are its assertions that they were not presented to or passed on by the courts.

E. PG&E's Assertion that the Factual Issues Controverted by it in its Reply Brief Before the Commission Were Not Litigated Before This Court and the Supreme Court is False. The Issues Were Hotly Litigated Before and Resolved in Sierra's Favor by both Courts.

In its brief and petition to review, PG&E repeatedly asserts* that "In the absence of findings and a ruling on the contract issue, the issue was not presented to the Supreme Court for its determination." (Pet. to Rev. p. 10; PG&E Br., App., p. 10.) The short answer is that whatever "contract issue" PG&E now contends that it raised as to the meaning of the contract in its reply brief was raised in substance in its brief before this Court, *and in identical*

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* See App. hereto, §3, quoting 7 misstatements in PG&E's present brief on this point.

form—indeed as virtually an exact reprint—in its reply brief before the Supreme Court.

What actually happened in the courts was that Sierra again raised the same two alternate contentions it had raised in the Commission, except that on its equitable point it devoted its attention primarily to attacking the Commission's refusal to find the facts as requested by it as arbitrary and contrary to the evidence. Thus in its opening brief on appeal to this Court, after arguing its legal contention that the contract could be changed under §206(a) but not under §205(d), Sierra presented its alternative ground in Point IV as follows:

> "In any event the arguments and findings advanced by the Commission in support of its holding that the proposed new rate is lawful are arbitrary, capricious, unsupported by the evidence and contrary to the evidence." (Sierra Br. on Prior Appeal, p. 40)

After a discussion of the evidence, the point concludes with the following statement:

> "* * * We submit further that it is apparent, quite apart from the issues of law involved, that the Commission's order is so inequitable that it cannot stand, and that the dissenting Commissioners were correct when they concluded that
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> '* * * PG&E—like Sierra in respect of the undisturbed 15-year term of the contract and its restrictive covenant regarding power supply—having made its bed, should be required to lie in it,—absent some showing of harm to the public interest if this axiom were followed'. (R. 2614)" (Sierra Br. on Prior Appeal, p. 48)

In its answering brief PG&E joined issue with these contentions, devoting its entire Point II to the proposition that "The order of the Federal Power Commission is fully supported by the evidence." (PG&E Br. on Prior Appeal, p. 22). In this point PG&E made substantially the same factual arguments to this Court as those which it successfully advanced in its reply brief before the Commission. For example, under the heading "The evidence fully supports the Commission's conclusion that in 1948 PG&E was the only feasible source of power supply to Sierra and does not support Sierra's contention that PG&E has, since that time, made Shasta Dam power unavailable to Sierra" (PG&E Br. on Prior Appeal, p. 32), PG&E expressly requested this Court to sustain the Commission's finding:

> "We submit that this Court must find that the Commission's conclusion that PG&E was the sole feasible source of additional power for Sierra in 1948 was the only reasonable conclusion which could have been drawn from the evidence." (PG&E Br. on Prior Appeal, p. 33).

Thus the issues regarding the negotiations preceding the contract at bar were squarely presented to and litigated before this Court on the prior appeal.* It is apparent from its opinion that this Court agreed with Sierra that the Commission's conclusion that the contract was not entered into to forestall government competition was contrary to the evidence. As this Court pointed out:

> "In 1938, Pacific Gas and Electric Company, a public utility under the laws of California, and Part II of the Federal Power Act, entered into its second 15-year contract to sell electric energy to Sierra Pacific Power Company, a public utility

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* Of course, neither this Court nor the Supreme Court reached the ultimate issue tendered by Sierra that, in the light of the true facts, it would be inequitable to permit PG&E to increase the rate, since both courts resolved Sierra's legal contention in its favor and that was dispositive of the case.

under the laws of California and Nevada. With the end of World War II, it became apparent that before expiration of this contract in 1953 Sierra's rapidly increasing demands would require either the construction of an additional transmission line into its area by PG&E, or the development of a new source of power. Accordingly, in 1947 Sierra commenced negotiations with PG&E and the Bureau of Reclamation which offered to furnish power from Shasta Dam.

"At first PG&E offered a 15-year contract at the 1938 contract rates but with an 'escalator fuel clause.' Sierra rejected this and turned to intensive negotiations with governmental agencies for 'cheap Government power.' PG&E then proposed a lower rate (the so-called P-31 schedule) for the same term without the escalator clause. This proposal was accepted in June 1948 and embodied in a contract which was duly filed with the California Public Service Commission and the Federal Power Commission. The P-31 schedule was a lower rate approved by the California Public Service Commission (formerly Railroad Commission) to enable PG&E to retain business of customers that would otherwise 'be lost altogether' to public power competition. But a significant condition of this approval was that any loss from such service would be borne by PG&E's stockholders and not by its other customers.

"In 1952, however, when public power from Shasta Dam was no longer available to Sierra, PG&E sought the California Commission's approval for rate increases for Sierra and other customers under the P-31 schedule.[2] The Commission refused on the ground that the special contracts were entered into 'in order to forestall alleged government competition and with the clear understanding that its stockholders must bear any burden * * *.' In

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"[2] With the significant exception of one city which still could have utilized Shasta Dam power."

> February 1953, in a further effort to increase its rates, PG&E filed the schedule of increased rates in question here with the Federal Power Commission under §205 of the Federal Power Act. * * *” (96 App. D. C. at 141, 223 F. 2d at 606.)[*]

In its principal brief on appeal to the Supreme Court, PG&E, as the appellant, raised its legal contention that, regardless of the fixed-rate character of the contract, the rate therein could be changed under the Act for, as we have seen, that was its sole affirmative contention throughout the prior proceeding.[**] Sierra on the other hand again raised the same two points it had raised throughout. Thus after argument of its legal point, Sierra's heading to Point V reads as follows:

> “Quite apart from the legal questions involved, it was an abuse of administrative discretion for the Commission to sanction PG&E's repudiation of its contract in the face of the undisputed evidence that it is not injurious to the public interest, and that the only effect of the repudiation is to benefit PG&E's stockholders. Moreover, the Commission's efforts to justify its action are arbitrary, capricious, unsupported by the evidence and contrary to

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[*] When Sierra cited this statement to the Court of Appeals for the Ninth Circuit, PG&E asserted that it was of no significance: “The statements as to the nature and purpose of the 1948 rate contract which appear in the Court of Appeals' opinion and later in the definitive opinion of the Supreme Court are Sierra's *contentions* of fact before the Commission. * * * That certain asserted facts would, if true, affect the validity of an order by no means establishes their truth.” (PG&E's Mem. before the Ninth Circuit in Ans. to Intervener's Reply Mem. on Motion to Dismiss, pp. 5-6). Thus, when this Court rejects PG&E's contention that it “must find that the Commission's conclusion * * * was the only reasonable conclusion which could have been drawn from the evidence”, PG&E blandly assures the Ninth Circuit, which of course had no familiarity with the prior proceeding, that this Court didn't mean what it said.

[**] Thus PG&E's first “question presented” in its petition for certiorari was:

> “Does the rate filing procedure prescribed by Section 205 of the Federal Power Act for obtaining a rate increase apply to Petitioner's rate for electric power service to Sierra Pacific Power Company, *such rate being embodied in a contract between the two companies?*” (PG&E's Pet. to Sup. Ct. for Cert. p. 2, reprinted in Supp. App. R.) (Emphasis added.)

the evidence." (Sierra Br. before Sup. Ct., p. 50, reprinted in Supp. App. R.)

In reply to this contention PG&E simply reprinted, with slight editorial changes, the portions of the reply brief which it had submitted to the Commission on which it now relies as proof that it raised the so-called "contract issue" before the Commission, *but not before the Courts!** As is apparent from its opinion, the Supreme Court, rejecting the contentions advanced by PG&E, agreed with this Court and with Sierra that the Commission's finding that the contract was not entered into for the purpose of meeting competition was contrary to the evidence. Thus the Court stated:

> "In 1947 Sierra, faced with increased postwar demands and consumer agitation for cheaper power, began negotiating for power from other sources, including the Federal Bureau of Reclamation, which at the time had unused capacity at Shasta Dam. To forestall the potential competition, PG&E offered Sierra a 15-year contract for power at a special low rate, which offer Sierra finally accepted in June 1948." (350 U. S. at 351-52)

PG&E's repeated assertion that because the issues raised in its reply brief before the Commission were "left undecided" by that body they could not be and were not raised or litigated before the courts is a shocking fabrication.

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* Compare Supp. App. R. 3004-15 (PG&E Reply Br. before Sup. Ct.) with Supp. App. R. 2424-30, 2437-40 (PG&E Reply Br. before Comm).

POINT III

Even if Sutherland's proffered testimony were admissible, it would not support PG&E's contentions.

A. The Sutherland Affidavit Shows Merely that Sierra Understood that the Contract Was Subject to Change by Regulatory Authority, Which Is What Sierra Has Conceded from the Outset.

It is incredible that having so effectively argued before the Commission in its original opening brief that under the parol evidence rule "the agreement was embodied in the service contract and neither party would be bound by prior statements or commitments," (see page 17 *supra*), PG&E should now ask this Court to direct the Commission to permit Mr. Sutherland to testify that PG&E itself had a side agreement with Sierra to the effect that, despite its terms, the contract rate could be changed without Sierra's consent. According to Mr. Sutherland's affidavit, before he signed the contract, he had a number of conferences with Mr. Tracy, Sierra's president, in the course of which

> "We both acknowledged to each other that the contract *did not expressly state our intention* to use a *filed* rate as the contract rate, and we openly discussed our understanding that the rate was *nevertheless* to be treated for all purposes as the filed P-31 rate *even though it was not named as such in the contract.*" (Supp. App. R. 3140.) (Emphasis added.)

In other words, PG&E is now asserting that it had the very kind of "side agreement" varying the express terms of the contract which it had correctly assured the Commission would be illegal and unenforceable under the parol evidence rule.

It is equally incredible that PG&E should offer such an affidavit, which was executed 1,104 days after the termination of the original proceedings before the Commission, as evidence that it had tendered an issue regarding the existence of such a side agreement on the prior proceedings.

Even more extraordinary is PG&E's temerity in asking leave to offer at this time, in support of an issue which it contends it raised and sought to litigate before the Commission in 1954, the testimony of a witness who had been available at that time and whose failure to testify was expressly commented on by counsel for Sierra at those hearings. (See Supp. App. R. 1455-56; Sierra's Reply Memorandum on its Cross-Motion to Dismiss pp. 11-12.)

But in any event we would point out that even if Mr. Sutherland had been called in the prior proceedings* and his testimony had not been barred by the parol evidence rule, it would have been of no help to PG&E. For in the first place the Court will note that Mr. Sutherland's affidavit, while cast in ambiguous language, actually says no more than that Mr. Tracy agreed that the contract rate was subject to change by the California Commission under the normal regulatory process, which, of course, Sierra has conceded since the outset of this litigation.

For example, after quoting Mr. Tracy as understanding that "the rate in the contract was the P-31 rate and would move up or down with changes in the P-31 rate", Mr. Sutherland continues:

> "He [Tracy] said that he understood we had to have it that way—*that it could not be any other*

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* In which case he would have been subjected to a severe cross-examination on the basis of the 7 pages of long hand notes which he had made a week before the contract at issue was offered to Sierra, and which are devoted exclusively to a comparison of the relative cost to PG&E and Sierra of power furnished from Shasta Dam with power furnished by PG&E at the proposed contract rate, both calculations being based upon the continuance of the contract rate for a period of fifteen years (R. 2080-86, discussed at pp. 44-45 of our brief before this Court on the prior appeal).

> *way because the rate was subject to change by the California Public Utilities Commission.*" (Supp. App. R. 3141.) (Emphasis added.)

Thus actually this affidavit on which PG&E bases its entire "contract" point merely states that the understanding of the parties as to the meaning and intent of the contract was what both parties asserted that it was throughout the prior proceedings: a contract subject to change by the appropriate regulatory body. The real dispute was that PG&E contended—erroneously—that this meant that it could change the rate unilaterally, while Sierra maintained—successfully—that the rate could only be changed by the appropriate commission, and on proper findings. Thus Mr. Sutherland's affidavit adds nothing to what was fully litigated and decided on the prior proceeding.

Secondly, it must be all too clear that whatever the proper construction of the Sutherland affidavit, the record shows that the California Commission refused to permit PG&E to increase the rate in any of its term contracts under the P-31 schedule without the purchaser's consent, expressly including the rate in the contract at issue, and that PG&E's repeated statements purporting to show that the California Commission ordered that rate increased are false from beginning to end.

B. PG&E's Repeated Assertions that the California Commission Ordered an Increase in the Rate but Granted Sierra's Request that it be Permitted to "Negotiate" a New Rate, and that Sierra Repudiated both the Alleged Agreement Sworn to by Sutherland and its "Representation" to the California Commission that it Would "Negotiate", are False.

PG&E's entire appeal on the so-called "contract issue" is based on the proposition that Sierra repudiated the alleged "side agreement" between Messrs. Sutherland and

Tracy, as well as its alleged "representation" to the California Commission that it would "negotiate" a new rate. Statements to this effect, cast in various ambiguous and contradictory verbiage, appear in practically every sentence on pp. 11-13 inclusive of PG&E's present brief, as well as in many other places therein.*

We submit that it is apparent from the quotations from the California Commission's order, set forth at page 20 *supra,* that as usual, PG&E's statements are false from beginning to end. For as there appears, the California Commission never "ordered a general increase in virtually all of Pacific's electric rates" (PG&E Br. p. 12). On the contrary, it refused to permit PG&E to increase the rates to any of its resale customers who had contracts at the P-31 schedule for a term of years and who objected to the increase, expressly including Sierra. Pointing out that these contracts had been entered into for the express purpose of meeting competition from Shasta Dam, the California Commission concluded that "equity" required that they be not increased without the purchaser's consent —i.e., unless a new rate was agreed to after "negotiation" between the parties.

Moreover PG&E's repeated statements to the effect that Sierra "requested" the California Commission to give it an opportunity to "negotiate" are directly refuted by that Commission's express statement that "The protestant, Sierra Pacific Power Company, makes the point that if conditions are shown to justify a change in the rate, *which conditions it denies have been shown,* then the contract rates might be altered, but such alteration should be made by agreement of the parties * * *." (R. 1788). (Emphasis added).

At page 13 of its present brief, PG&E makes perhaps its boldest effort to mislead this Court as to what the

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* See App. hereto, §4, quoting 11 relevant misstatements by PG&E.

California Commission did. For there it quotes the following paragraph from the California Commission's order:

> "'It is obvious that underlying costs have increased since these contracts were negotiated. Since, by this decision, a new basic resale schedule [Schedule 'R'] is being adopted, opportunity should be afforded for renegotiation of these contracts in the light of the new basic resale schedule.' (R. 1789; 96 P.U.R. (N.S.) at 526)."

An examination of the Commission's order will show that in the immediately preceding sentence of the same paragraph, which PG&E fails to quote, the California Commission said:

> "The Commission, in considering these special contracts, is of the opinion that an opportunity should be afforded the parties to renegotiate their contracts, *should they so determine.*" (R. 1789.) (Emphasis added.)

Equally sprinkled with falsehood is PG&E's insinuation that Sierra, unlike other P-31 customers, "repudiated" its obligation to negotiate an increased rate. The record shows that none of the resale customers whose rates the California Commission refused to increase "determined" to negotiate except in connection with an extension of their special low rate treatment beyond the date of their existing five-year contracts. Thus, as appears from PG&E's application to the California Commission in 1955 in connection with the City of Alameda and the Commission's order entered thereon,* when the termination date of these five-year contracts was approaching, these customers entered into negotiations with PG&E resulting in a series of new contracts the rates of which, while slightly in excess of the P-31 rate during the remaining days of the original contracts, nevertheless remained lower than the Schedule R rate (the rate which PG&E has been and is still attempting to impose on Sierra) for a total of three years. No doubt, Sierra would be prepared at any time to enter into negotiations which, while permitting a gradual increase of the rate over the last years of the existing contract, would also give Sierra the benefit of a special low rate during the earlier years of an extension thereof. But in any event it is clear that PG&E cannot rely on anything that has taken place before the California Commission in relation to its other P-31 contract customers in support of its attempt to force the Schedule R rate directly upon Sierra, without its consent, and while its contract has an additional thirteen years to run.**

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* Copies of which are found in Supp. App. R. 2730-47.

In other words, it is clear beyond peradventure that the California Commission took exactly the same position as did the courts in the prior proceeding: that contracts for a fixed rate for a term of years should not be changed without the purchaser's consent.

We submit that even if everything else in PG&E's present brief were true and if PG&E had a legal right to present the evidence of Mr. Sutherland, it could not prevail. For conceding that the rate in the contract at bar is subject to "all changes that might subsequently be made in" the P-31 rate (Supp. App. R. 3139), it is quite plain that both the California Commission and the Commission have refused to make any change in the P-31 rate as applied to the contract at bar.

CONCLUSION

We submit that even if the Commission's order refusing to hold further hearings were reviewable and PG&E's contention regarding its right to increase the rate by unilateral filing because of the alleged "meaning of the

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** See p. 17, *supra.*

contract" were not barred by the decisions of this Court and the Supreme Court, the Commission's order must be sustained because PG&E's contentions have not even a shred of basis in fact.

We submit also that because of the obviously false, frivolous and sham nature of all of PG&E's present contentions it is apparent that its present appeal, as well as its "motion to reopen" before the Commission, are intended solely for the purpose of delay and that therefore Sierra is entitled to an award of double costs and damages under Rule 23 of this Court's Rules. In this connection we would point out that the record now before this Court shows that the amount which Sierra has been precluded from collecting by this appeal is $889,908.23, representing the unpaid balance of the sums collected from Sierra by PG&E under its unlawful filing, prior to the decision of the Supreme Court in the original proceeding (Supp. App. R. 2689). Sierra has brought an action for restitution of this sum in the United States District Court for the Northern District of California, Southern Division (Supp. App. R. 2683), and that action has been stayed on PG&E's motion, pending the final determination of the present appeal.*

We submit that on such a record as that here presented, an award of damages should be made not only to compensate Sierra for the damage done to it by reason of the delay, as pointed out in our cross-motion to dismiss at page 22, but in the interest of the proper administration of justice. It seems to us that when litigants abuse the judicial process, engaging in misstatement after misstatement with no regard either for recorded facts or the prior decisions of the courts to the degree disclosed by this record, the sound administration of justice requires that exemplary damages be assessed as a warning to all that the courts may not be trifled with.

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* See PG&E's Mem. before the Ninth Circuit in Ans. to Intervener's Reply Mem. on Motion to Dismiss, App., pp. 1-5.

Respectfully submitted,

William C. Chanler,
Lawrence A. Baker,
40 Wall Street,
New York 5, New York,
Attorneys for Intervener.

Of Counsel:
Winthrop, Stimson, Putnam & Roberts,
J. Philip Bahn,
Stephen A. Weiner,
40 Wall Street,
New York 5, New York.

APPENDIX

Catalogue of Principal Misstatements in PG&E's Current Brief.

§1.

That before the Commission PG&E had raised a "second alternative ground" that the parties had expressly agreed that despite the language of the contract the rate would be changeable whenever the P-31 rate was changed. (15 misstatements)

"Where an administrative agency decides a case in favor of party P by finding in P's favor on one ground, but refuses to find whether P should prevail on *a second alternative ground urged by P,** and the agency is then reversed as to the one ground on an appellate review brought by S (the losing party before the agency), may the agency on remand consider whether P is entitled to prevail *on the alternative ground originally urged?*" (Questions Presented)

"Pacific had pointed out that the rate used in the contract was Pacific's P-31 rate then on file with the California Public Utilities Commission, that the parties knew this, *and that they agreed the rate would be changed, upward or downward, whenever the California Commission found the P-31 rate to be unreasonable*—which the California Commission did in 1952, just prior to the commencement of the F.P.C. proceeding." (p. 3)

"Pacific also asked the Commission to decide the question left undecided in the original proceeding—namely, *whether the parties in fact had agreed to a fixed rate for their contract, as Sierra contended, or had agreed to a changeable rate, as Pacific contended.*" (p. 4)

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* Throughout this appendix the particular misstatement referred to is italicized.

"To eliminate any doubt that the rate specified in dollars in the contract was understood to be the filed P-31 rate and that it was meant to change, upward or downward, with any changes in the P-31 rate on file with the California Commission, Mr. Sutherland, at the Reno meeting, asked Mr. Tracy if he understood this. *He was assured by Mr. Tracy that he did so understand* (Supp. App. R. 3140). On two later occasions also, Mr. Tracy acknowledged to Mr. Sutherland that this was Sierra's understanding of the contract (Supp. App. R. 3140-3141)". (p. 11)

"It thus repudiated, not only its representation to the California Commission, *but also Mr. Tracy's representation to Mr. Sutherland that he understood and agreed that the rate in the contract, being the filed P-31 rate, would change, upward or downward, with changes in the filed P-31 rate,* such as the California Commission had just ordered (Supp. App. R. 3140-3141, 3143)". (p. 13)

"*To enforce its agreement with Sierra,* as well as to seek redress for Sierra's repudiation of its offer to 'negotiate,' Pacific filed a formal petition on January 20, 1953, asking the California Commission to directly order the Sierra rate increased to the new Schedule R." (p. 13)

"In filing this Supplement No. 1 rate with the F.P.C., Pacific was, of course, acting consistently with *its agreement with Sierra that an increase would be forthcoming if the P-31 rate were increased by the California Commission.*" (p. 15)

"Before the F.P.C., Sierra took a position that was quite different from *its expressed understanding at the time the contract was entered into* (Supp. App. R. 3140-3142) and quite different from its testimony before the California Commission at the time the parties sought authorization for the contract (R. 1673-1683)". (pp. 15-16)

"Pacific's position was, as it has always been and still is, that the parties did not intend the rate to be fixed for the life of the contract, *that the parties had always understood the rate was meant to be the filed P-31 rate, and that it was meant to be changeable whenever the P-31 rate was found to be unreasonable,* as the California Commission had just found (Supp. App. R. 2420-2423)". (p. 16)

"On remand, therefore, the Commission should have decided the issue, left undetermined by it, as to whether the parties in fact *had agreed to a 'changeable' rate tied to Pacific's P-31 rate on file* with the California Commission, as Pacific had contended, or had agreed to a 'fixed' rate, as had been claimed by Sierra." (p. 23)

"In the absence of findings on the issue by the Commission, the question whether the parties agreed to a 'fixed' rate for a 15-year minimum term, as Sierra claimed, *or agreed to a 'changeable' rate tied to Pacific's P-31 rate on file with the California Commission, as Pacific claimed,* was a matter for decision in the first instance by the Commission." (p. 25)

"15. As we have noted, Pacific had taken issue with these asserted facts. *It had argued to the Commission that facts existed which showed the parties had agreed to use the P-31 rate in the contract and had agreed that the rate in the contract would therefore change, upward or downward,* whenever the P-31 rate, on file with the California Commission, was found to be unreasonable, as the California Commission had just found a few months before the initiation of the F.P.C. proceeding (See pp. 16, 3 above)". (p. 26)

"With such clear announcements by the Supreme Court and this Court of the 'question' being decided by them, why does the Commission now say that the Supreme Court also decided the question as to *what kind of rate* *the parties had actually agreed upon for their contract?"* (p. 27)

"In essence, Sierra seems to think that Pacific should have persuaded the Supreme Court and this Court to decide the issue, left undecided by the Commission, *as to whether the parties in fact agreed to a fixed rate and that Pacific should be penalized for failing to do this."* (p. 35)

"Thus, it was plainly the duty of the Commission to decide the pertinent question, left undecided by it before, *as to whether the parties agreed to a 'fixed' or a 'changeable' rate for their long-term contract."* (p. 40)

§2.

That the Commission "refused and failed to make any findings" on this alternate issue, and left it undecided. (14 misstatements)

"Where an administrative agency decides a case in favor of party P by finding in P's favor on one ground, *but refuses to find whether P should prevail on a second alternative ground urged by P,* and the agency is then reversed as to the one ground on an appellate review brought by S (the losing party before the agency), may the agency on remand consider whether P is entitled to prevail on the alternative ground originally urged?" (Questions Presented)

"In deciding the case, *the F.P.C. did not resolve the dispute as to whether the parties had agreed to a fixed or changeable rate and made no findings on that issue."* (p. 3)

"Pacific also asked the Commission *to decide the question left undecided in the original proceeding*—namely, whether the parties in fact had agreed to a fixed rate for their contract, as Sierra contended, or had agreed to a changeable rate, as Pacific contended." (p. 4)

"It is Pacific's contention that the Commission's action *in refusing to resolve the conflict as to the actual agreement of the parties* * * * was erroneous, arbitrary, an abuse of discretion, and a denial of due process of law." (p. 5)

"Despite the evidence and argument devoted to the question, *the Commission did not decide the issue.* Instead, it simply ruled that *any* rate, even a 'fixed' rate such as Sierra claimed it had, could be changed under §205 (R. 2598-2605; 7 P.U.R. 3d at 265-269)." (p. 17)

"It [PG&E] also asked the Commission to determine the question left undecided before—i.e., whether the Sierra contract was in fact one for a fixed rate as Sierra had claimed, or one for a changeable rate as Pacific had claimed—so that it could be determined whether, on the *true* facts, §205 or §206 was applicable (Supp. App. R. 2817-2821)." (p. 19)

"They [the Courts] did not decide whether Sierra in fact had such a contract, *since the Commission had made no findings on this point.*" (p. 23)

"On remand, therefore, *the Commission should have decided the issue, left undetermined by it,* as to whether the parties in fact had agreed to a 'changeable' rate tied to Pacific's P-31 rate * * *." (p. 23)

"The Commission did not choose to find whether or not these facts actually existed. It assumed for the purposes of its decision that they did exist, but ruled that they were not of legal significance." (p. 26)

"As we have seen, the Commission, *instead of resolving the dispute over whether Sierra had a fixed-rate contract,* ruled as a matter of law that even a fixed-rate contract such as Sierra claimed to have could be changed under §205." (p. 29)

"In essence, Sierra seems to think that Pacific should have persuaded the Supreme Court and this Court to decide the issue, *left undecided by the Commission,* as to whether the parties in fact agreed to a fixed rate * * *." (p. 35)

"It is also clear that Pacific is in no sense to be penalized or condemned because a particular issue, *left undecided by the Commission,* was also left undecided by both this Court and the Supreme Court. Pacific has since the very inception of the initial proceeding before the F.P.C. done all it properly could do to have the tendered issue heard and decided, and is still doing all it can toward that end." (pp. 37-38)

"The Commission must now decide the issues which it has so far left undecided." (p. 38)

"Thus, it was plainly the duty of the Commission to decide the pertinent question, *left undecided by it before,* as to whether the parties agreed to a 'fixed' or a 'changeable' rate for their long-term contract." (p. 40)

§3.

That neither this Court nor the Supreme Court ever passed on the factual issues controverted by PG&E in its reply brief. (7 misstatements.)

"They [the Courts] *did not decide whether Sierra in fact had such a contract,* since the Commission had made no findings on this point." (p. 23)

"The Supreme Court and this Court decided only the question of 'law' involved in the Commission's ruling." (p. 26)

"As we have seen, the Commission, instead of resolving the dispute over whether Sierra had a fixed-rate contract, ruled as a matter of law that even a fixed-rate contract such as Sierra claimed to have could be changed under §205. *The reviewing courts simply decided the case on the same basis.* Since the Commission had assumed for purposes of its decision that Sierra had a fixed-rate contract, *the courts assumed the same thing.*" (p. 29)

"As we have seen, *the Supreme Court and this Court did not purport to decide whether the parties did in fact agree to a fixed rate for their contract.* There is, therefore, no 'law of the case' expressly covering this issue." (p. 30)

"Nor can it be said that the Supreme Court or this Court decided the question by implication as part of its statement of the facts before it reached the express 'question' announced for decision. The statement of the facts in an appellate opinion forms no part of the law of the case. It merely provides the 'setting' to show what the question of law brought up for decision is." (p. 30)

"In essence, *Sierra seems to think that Pacific should have persuaded the Supreme Court and this Court to decide the issue,* left undecided by the Commission, as to whether the parties in fact agreed to a fixed rate and that Pacific should be penalized for failing to do this. In short, Sierra seems to argue that if the Commission erred in not determining whether the parties had a fixed-rate contract, *Pacific should have asked this Court or the Supreme Court to correct the error.*" (p. 35)

"It is also clear that Pacific is in no sense to be penalized or condemned because a particular issue, left undecided by the Commission, *was also left undecided by both this Court and the Supreme Court.* Pacific has since the very inception of the initial proceeding before the F.P.C. done all it properly could do to have the tendered issue heard and decided, and is still doing all it can toward that end." (pp. 37-38).

§4.

That the California Commission ordered an increase in the rate but granted Sierra's request that it be permitted to "negotiate" a new contract, and that Sierra repudiated its agreement with the California Commission. (11 misstatements)

"Pacific had pointed out that the rate used in the contract was Pacific's P-31 rate then on file with the California Public Utilities Commission, that the parties knew this, and that they agreed the rate would be changed, upward or downward, whenever the California Commission found the P-31 rate to be unreasonable—*which the California Commission did in 1952, just prior to the commencement of the F.P.C. proceeding.*" (p. 3)

"It also contended that, if an increase were found to be justified, *the Commission should allow Sierra to 'negotiate' with Pacific for an increased rate* rather than merely order the rate increased to make it conform with any increase ordered in the P-31 rate (R. 1788)." (p. 12)

"*The* [*California*] *Commission found that Pacific's resale revenue, including that from Sierra,* was roughly 35% below the cost of service and determined that the P-31 rate should be raised substantially to restore Pacific's former return under it *and thus prevent an 'unreasonable burden on other customers' caused by a continuance of the rate at the old level* (R. 1788)." (p. 12)

"In other words, *the* [*California*] *Commission did not agree with Sierra's contention that the P-31 rate and its own should not be increased. But it granted Sierra's request that it be allowed time to 'negotiate' an increased rate* * * *." (p. 13)

"Despite the granting of its request to negotiate, Sierra refused to do so" (R. 988; Supp. App. R. 389-390; 425-426). (p. 13)

"It thus repudiated, not only its representation to the California Commission, but also Mr. Tracy's representation to Mr. Sutherland that he understood and agreed that the rate in the contract, being the filed P-31 rate, would change, upward or downward, with changes in the filed P-31 rate, *such as the California Commission had just ordered"* (Supp. App. R. 3140-3141, 3143). (p. 13)

"To enforce its agreement with Sierra, *as well as to seek redress for Sierra's repudiation of its offer to 'negotiate,'* Pacific filed a formal petition on January 20, 1953, asking the California Commission to directly order the Sierra rate increased to the new Schedule R." (p. 13)

"When Sierra repudiated *its representation to the California Commission* and to Pacific *and refused to negotiate* a higher rate in the light of the new resale Schedule R, Pacific * * * also invoked the aid of the F.P.C. for enforcement of its agreement with Sierra." (p. 15)

"Before the F.P.C., Sierra took a position that was quite different from its expressed understanding at the time the contract was entered into (Supp. App. R. 3140-3142) *and quite different from its testimony before the California Commission at the time the parties sought authorization for the contract* (R. 1673-1683)." (pp. 15-16)

"After making this ruling of law, the Commission went on to find, *as had the California Commission,* that costs of generating electricity had greatly increased since 1948 and that an increase in the rate for the Sierra service was necessary to restore Pacific's return on the Sierra service." (p. 17)

"* * * the Commission ruled rather enigmatically that all Pacific was offering to show was that the 1948 rate 'may or may not * * * cast an excessive burden upon other of P.G.&E.'s electric utility customers,[13] be unduly discriminatory, or otherwise adversely affect interests of public concern * * *.' "

"13. *The California Commission, it will be recalled, had already found this to be the case* (See p. 12 above)." (p. 20)

CROSS-MOTION OF INTERVENER TO EXERCISE JURISDICTION ON TRANSFER FROM NINTH CIRCUIT, AND TO DISMISS PETITION TO REVIEW ON GROUNDS NO APPEALABLE ISSUE EXISTS AND CONTENTIONS IN PETITION ARE SHAM AND FRIVOLOUS

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,422

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,
v.
FEDERAL POWER COMMISSION,
Respondent,
SIERRA PACIFIC POWER COMPANY,
Intervener.

ON PETITION TO REVIEW ORDER OF FEDERAL POWER COMMISSION

William C. Chanler,
Lawrence A. Baker,
40 Wall Street,
New York 5, New York,
Attorneys for Intervener.

Of Counsel:
Winthrop, Stimson, Putnam & Roberts,
40 Wall Street,
New York 5, New York,
J. Philip Bahn,
Stephen A. Weiner.

United States Court of Appeals
For the
District of Columbia Circuit
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IN THE

United States Court of Appeals

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Pacific Gas and Electric Company,
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CROSS-MOTION OF INTERVENER TO EXERCISE JURISDICTION ON TRANSFER FROM NINTH CIRCUIT, AND TO DISMISS PETITION TO REVIEW ON GROUNDS NO APPEALABLE ISSUE EXISTS AND CONTENTIONS IN PETITION ARE SHAM AND FRIVOLOUS

Comes Now Sierra Pacific Power Company (Sierra) and, answering the Federal Power Commission's motion to return the record to the United States Court of Appeals for the Ninth Circuit, moves this honorable Court, pursuant to Rule 31 of its Rules, to exercise jurisdiction on the transfer of the record from the Ninth Circuit, and to dismiss the petition to review herein on the grounds that the issues presented are non-appealable; based on plain misstatements of the prior proceedings in this litigation; or sham, frivolous, and contemptuous of the prior decisions of this Court and the Supreme Court of the United States. Sierra also moves for damages and double costs pursuant to Rule 23.

This motion is based on the record before this Court in *Sierra Pacific Power Company* v. *Federal Power Commission,* No. 12,430, and on the record transmitted to this Court by the Ninth Circuit, as supplemented by excerpts, printed in the appendix hereto, from documents filed in the case.

Statement

In support of this cross-motion, Sierra respectfully shows the following:

As appears from the petition herein, the order sought to be reviewed was issued by the Federal Power Commission (the Commission) on July 10, 1957. The order terminates a Commission proceeding which was commenced early in 1953 and which this Court (by an order of June 12, 1956 in *Sierra Pacific Power Company* v. *Federal Power Commission,* No. 12,430) remanded to the Commission after this Court's decision was affirmed by the Supreme Court of the United States.

As the Court will recall from its opinion in *Sierra Pacific Power Co.* v. *Federal Power Commission,* 96 App. D.C. 140, 223 F.2d 605 (1955), *modified,* 99 App.D.C. 128, 237 F.2d 756, and from the opinion of the Supreme Court affirming this Court, 350 U. S. 348 (1956), the Commission proceeding concerns the efforts of Pacific Gas and Electric Company (PG&E) to repudiate a rate contract under which it sells electric energy to Sierra. The contract, entered into in 1948, provided for a special low rate for a basic fifteen year term, which was offered by PG&E in order to forestall a threat of competition from Shasta Dam. However, in February 1953, when the threat of competition no longer existed, PG&E, in repudiation of its contract, filed an increased rate with the Commission under §205 of the Federal Power Act.*

Sierra intervened and contended that, as the rate was fixed by contract, it could not be abrogated unilaterally by a filing made by PG&E under §205 but only by the Commission after a finding by it under §206(a)** that the rate contract is against the public interest. The Commission rejected Sierra's contention, holding that PG&E could abrogate the contract rate by the unilateral filing of a reasonable, superseding rate under §205, and also stating that, if a §206(a) "finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful." (96 App.D.C. at 144, 223 F.2d at 609)

This Court held that PG&E could not abrogate the contract rate by filing the increased rate without Sierra's consent, and that the Commission had neither held a

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* Act of August 26, 1935, c. 687, 49 Stat. 851, U.S.C.A., Title 16, §824d.

** *Id.,* 49 Stat. 852, U.S.C.A., Title 16, §824e(a).

§206(a) proceeding nor, in any event, made the finding necessary to Commission abrogation under §206(a). Accordingly, this Court set aside the Commission's order and remanded the case to the Commission with instructions to dismiss the proceeding but without prejudice to the initiation of a new proceeding under §206(a).

The Supreme Court of the United States, on writs of certiorari, upheld this Court on the §205 issue, concluding "that neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra." (350 U. S. at 353) Turning to the §206(a) issue, the Supreme Court decided that a §206(a) finding could have been made in the Commission proceeding and assumed, *arguendo,* that there had been such a finding that the contract rate was unreasonable. It then held, however, that the assumed finding was "based on an erroneous standard" and that, where a public utility agrees "by contract to a rate affording less than a fair return," it is not "entitled to be relieved of its improvident bargain":

> "In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." (350 U. S. at 354-55)

Having laid down the proper standard for a §206(a) determination as to a rate contract, the Supreme Court concluded:

> "Whether under the facts of this case the contract rate is so low as to have an adverse effect on the public interest is of course a question to be determined in the first instance by the Commission. We

> shall therefore affirm the order of the Court of Appeals, with instructions to remand the case to the Federal Power Commission for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable." (350 U. S. at 355)

There followed this Court's remand of June 12, 1956 to the Commission "for such further proceedings not inconsistent with the opinion of the Supreme Court * * * as the Commission may deem desirable."

As stated in the petition to review, PG&E, "on the remand, moved the F.P.C. to reopen [the proceeding] * * * in order (a) to make findings as to whether the rate specified in the 1948 contract was on and prior to June 17, 1954, and thereafter, 'so low as to have an adverse effect upon the public interest' * * *; and (b) to allow Pacific to present further evidence on those points, in addition to that already in the record, to show that the [contract] rate * * * was, prior to June 17, 1954, and ever since has been" too low under the standards set forth by the Supreme Court. (Pet. to Rev., pp. 5-6) This "motion" to reopen was filed June 11, 1956.

Sierra answered, showing that PG&E's allegations of harm to the public interest were sham and frivolous, and also filed a complaint showing that PG&E was unlawfully continuing to bill Sierra at the unilaterally-filed rate, despite the judgment of this Court and the Supreme Court's conclusion "that neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra." (350 U. S. at 353)

After decision had been pending for some time on the motion to reopen the §206(a) issue, PG&E, on July 26, 1956, requested the Commission either to grant the motion or to give it leave to file a reply to Sierra's answers. The

Commission, on September 7, 1956, granted both parties leave to submit any facts or further argument they might wish to adduce in support of their respective contentions. On October 15, 1956, PG&E filed a supplemental "motion" to reopen, accompanied by a lengthy "Submission." In these incredible documents, PG&E asserted for the first time, four months after its original motion had been filed and over three years after the commencement of the litigation, that its "basic contention" throughout the litigation had been that "the contract between P. G.&E. and Sierra contemplates a changeable and not a fixed rate," and that that issue remained "undecided by the Commission." (Appendix, 15a-16a) In blatant repudiation of this Court's (and the Supreme Court's) decision that the unilateral 1953 filing had been ineffective to abrogate the contract rate, PG&E's "Submission" went on as follows:

> "If P. G.&.E. is correct in its basic contention that the contract rate was never intended by the parties to be a firm rate, but was intended to be subject to change in accordance with usual concepts to reflect changes in P. G.&E.'s costs of service for resale customers, then the Commission need merely find this to be the fact. This finding would completely dispose of the case, for the Commission has already * * * found the old rate 'unreasonable' and the new one 'reasonable' according to usual concepts * * *." (Appendix, 16a-17a)

The order now sought to be set aside was issued July 10, 1957. It ordered PG&E to cease and desist from billing Sierra at a rate in excess of the contract rate and denied PG&E's motions to reopen, "the requested reopening and further Commission proceedings being a matter committed to the discretion of the Commission by Section 206 of the Act * * *." (Pet. to Rev., App., p. 5)

On the claim that the contract rate is adverse to the public interest, the Commission found that "the factual bases which PG&E adduces * * * do not appear to be of a nature which would compel or warrant further examination or investigation by the Commission at this time." (*Id.* at 6) As for PG&E's "basic contention that the contract rate * * * was intended to be subject to change in accordance with usual concepts" (that is, unilaterally by PG&E), the Commission held the contention disposed of by the Supreme Court's decision.

Rehearing of the July 10, 1957 order was duly sought and denied, and PG&E (obviously not wanting to argue its "basic contention" in this Court, which had already held the contract binding) filed the petition to review in the United States Court of Appeals for the Ninth Circuit. On February 14, 1958, the Ninth Circuit dismissed the petition on the ground of this Court's exclusive jurisdiction over the subject matter and, on April 1, 1958, in response to a petition for rehearing by PG&E requesting such action, ordered the petition physically transferred to the Clerk of this Court. The April 1 order, however, denied PG&E's petition for rehearing without prejudice to its renewal in the event this Court should not entertain jurisdiction of the petition to review. There followed the Commission's pending motion to this Court to return the record to the Ninth Circuit and thereby not entertain jurisdiction.

As the Court will note, the petition to review makes two points; first, that PG&E is entitled to a Commission hearing and decision on its claim that the contract rate is, within the standards of §206(a), contrary to the public interest; second, that PG&E is entitled to a Commission hearing on its "basic contention", which "would completely dispose of the case," that the contract rate was never intended to be fixed but was intended to be unilaterally changeable by PG&E.

Sierra's instant motion to dismiss is based on the following grounds: First, PG&E is not "aggrieved" by the Commission's order refusing to proceed under §206(a) because it has no standing to ask to be relieved of its own contract; moreover, both by statute and by the terms of the remand, the decision whether or not to hold a proceeding under §206(a) is entirely within the discretion of the Commission. For these reasons, the order is not appealable. Second, the judgment of this Court, as affirmed by the Supreme Court, finally adjudicated and denied PG&E's right to abrogate the contract rate by its unilateral 1953 filing of a higher rate, so that any consideration of the "meaning of the contract" (Pet. to Rev., p. 10) is barred by that judgment and entirely outside the scope of the remand. On this second point, Sierra also shows that in any event the meaning and intent of the rate provisions of the 1948 contract have been previously litigated and finally decided against PG&E's "basic contention" in every respect.

Before presenting these contentions, Sierra wishes to point out that this Court has jurisdiction as a result of the physical transfer of the petition to review from the Court of Appeals for the Ninth Circuit.

I

This Court has jurisdiction of the petition to review as a result of the physical transfer of the petition from the Court of Appeals for the Ninth Circuit.

The Commission's pending motion asks that the petition to review and other papers herein be returned to the Court of Appeals for the Ninth Circuit. The Commission's argument is based on the ground that §313(b)* requires the filing of the petition to review in this Court within sixty days after the order of the Commission upon application for rehearing before the Commission, and that such filing has not been made.

We disagree. Upon the basis of the cases cited in our motion to dismiss in the Ninth Circuit (*Hicks* v. *National Labor Relations Board,* 100 F.2d 804 (4th Cir. 1939); *Morris* v. *Securities and Exchange Commission,* 116 F.2d 896 (2d Cir. 1941)), there is no doubt that this Court, as a result of gaining "exclusive venue and jurisdiction" to review the initial Commission order of June 17, 1954, "retains" exclusive venue and jurisdiction "with regard to further orders issued upon remand in the same proceedings and involving the same parties, subject matter, and controversy." (*Pacific Gas and Electric Co.* v. *Federal Power Commission,* F.2d (9th Cir. 1958)). This, of course, is the basis of the Ninth Circuit's decision of February 14, 1958 granting our motion to dismiss. If that decision is correct, and we do not understand the Commission to dispute it, the Commission's pending motion in this Court can be defended solely on the ground of lack of a timely filing in this Court of the petition to review. However, in similar circumstances, it has been ruled that lack of a timely filing is irrelevant to jurisdiction provided that the petition to review has been timely filed in a court of appeals lacking jurisdiction and has been physically transferred by that court to another court of appeals having jurisdiction. *Columbia Oil & Gasoline Corp.* v. *Securities and Exchange Commission,* 134 F.2d 265 (3rd Cir. 1943); *L. J. Marquis & Co.* v. *Securities and Exchange Commission,* 134 F.2d 335 (2d Cir. 1943); *L. J.*

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* Act of August 26, 1935, c. 687, 49 Stat. 860, U.S.C.A., Title 16, §825*l*(b).

Marquis & Co. v. *Securities and Exchange Commission,* 134 F.2d 822 (3rd Cir. 1943); *see American Power & Light Co.* v. *Securities and Exchange Commission,* 325 U. S. 385, 391 (1945).

The *Columbia-Marquis* recognition of jurisdiction by transfer, and the Supreme Court's approval of it, must rest on one of two bases: either that the operative fact is the physical transfer to "the court having exclusive jurisdiction over the order sought to be reviewed" (*Columbia Oil & Gasoline Corp.* v. *Securities and Exchange Commission, supra,* at 267), or that the transferee court may receive the case if it considers it equitable to do so and may refuse the case if the petitioner's position is lacking in equity. *Ibid.*

Whichever of these bases is correct, the Commission's request for summary return to the Ninth Circuit cannot be reconciled with this Court's exclusive jurisdiction over the order sought to be reviewed and with the fact of timely filing in the Ninth Circuit. Moreover, as we show throughout this motion, PG&E advances contentions in its petition to review which are so sham and frivolous as to leave it wholly without equity before this Court.

II

PG&E is not aggrieved by the order of the Commission terminating the proceedings under §206(a) and, in any event, the order is not appealable. Therefore, the petition to review should be dismissed in so far as it deals with the Commission's action under §206(a).

Sierra respectfully contends that PG&E cannot seek review of the Commission's order as to §206(a), first, because PG&E is not "aggrieved" by the order, and second, because the decision whether to proceed to a determination under §206(a) is entirely within the Commission's discretion.

A

Petitioner is not "aggrieved" by the Commission's order and thus cannot seek review in this Court.

The order of the Commission terminating the proceedings under §206(a) did not "aggrieve" PG&E and thus it has no standing to petition this Court for review. Federal Power Act, §313(b).

As the Supreme Court held, when a public utility has agreed by contract to a rate affording less than a fair return, it is not "entitled to be relieved of its improvident bargain. * * * In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest * * *. [T]he purpose of the power given to the Commission by §206(a) is the protection of the public interest, as distinguished from the private interests of the utilities * * *." (350 U. S. at 355) Similarly, in the companion case of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 344-45 (1956), the Supreme Court pointed out that public utilities "are understandably not given the same explicit standing to complain of their own contracts as are those who represent the public interest or those who might be discriminated against * * *."

Thus it is clear that PG&E has no right to complain of its own contract or to ask to be relieved of its burden. Its private interests are of no concern to the Commission, or to this Court, in this proceeding. The Commission, as the duly designated guardian of the public interest, has investigated the impact of the contract rate upon the public interest, has consulted with representatives of the public,* and has concluded that further proceedings are not warranted. PG&E cannot be deemed "aggrieved" by that conclusion, for it has not been deprived of or denied any right. *United Gas Pipe Line Co.* v. *Federal Power Commission,* 203 F.2d 78 (5th Cir. 1953).

B

The decision whether to proceed to a determination under §206(a) is committed entirely to the Commission's discretion both by the terms of the remand and by the statute, and its decision not to reopen the proceedings is therefore not appealable.

As is quite clear from the Supreme Court's opinion, remand to the Commission "for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable" (350 U. S. at 355) was intended to give the Commission an opportunity to consider the contract rate in the light of the standards governing application of §206(a) as laid down by the Court. It is plain on the face of this remand that the question as to whether the Commission should hold further proceedings was left entirely to the Commission's discretion. It is also plain as a matter of law that, at least in the absence of a complaint by a party empowered to file a complaint, a decision to hold or refuse to hold proceedings under that section is committed to the Commission's sole discretion.

Section 206(a) authorizes a finding on the lawfulness of a contract or other rate "after a hearing had upon [the Commission's] own motion or upon complaint", while

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* As pointed out in the Commission's order, the California, Nevada and Oregon utilities commissions did not indicate any objection to the contract rate. Moreover, "the Commission has not received any complaints or protests by any resale customers of PG&E other than Sierra or by any ultimate consumers served by PG&E or others." Pet. to Rev., App. p. 9, n. 9.

§306,* headed "Complaints", authorizes "any person, State, municipality, or State commission complaining of anything done or omitted to be done by any * * * public utility in contravention of the provisions of this Act [to] apply to the Commission by petition." Section 306 goes on to say that if the public utility shall not satisfy the complaint or there shall appear to be any reasonable ground for investigating, the Commission shall investigate the matters complained of in such manner and by such means as it shall find proper.

It is obvious on the face of these sections that §206(a) deals with complaints *against* public utilities, either by a third party claiming to be aggrieved by the utility's actions or by the Commission itself acting as a guardian of the public interest, and not with complaints *by* public utilities. As PG&E itself has no right to complain of its own contract, and as no "person, State, municipality, or State commission" has filed a complaint with the Commission complaining of PG&E's contract,** it follows that PG&E's "motion" for a hearing and determination under §206(a) was no more than a "request," addressed solely to the discretion of the Commission, that it act upon its own motion. As the Supreme Court pointed out in *Mobile, supra,* while a utility may not file a complaint:

> "* * * there is nothing to prevent [a public utility] * * * from furnishing to the Commission any relevant information and *requesting* it to initiate an investigation on its own motion." (350 U. S. at 345) (Emphasis added)

The law is perfectly clear that not only does a statute of this nature vest discretionary jurisdiction in an agency, but also that an administrative decision not to take action under such a statute cannot be the subject of review in the courts, even though the party seeking review alleges "abuse of discretion." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18-19 (1943); *Leighton* v. *Securities and Exchange Commission*, 95 App.D.C. 217, 221 F.2d 91 (1955), *cert. denied*, 350 U. S. 825 (1955); *Hourihan* v. *National Labor Relations Board*, 91 App.D.C. 316, 201 F.2d 187 (1952), *cert. denied*, 345 U. S. 930 (1953); *General Drivers, etc., Local 886, AFL* v. *National Labor Relations Board*, 179 F.2d 492 (10th Cir. 1950); *Lincourt* v. *National Labor Relations Board*, 170 F.2d 306 (1st Cir. 1948); *Crooker* v. *Securities and Exchange Commission*, 161 F.2d 944 (1st Cir. 1947); *Att'y Gen. Manual on Admin. Proc. Act*, pp. 94-95 (1947); see also *United States* v. *George S. Bush & Co.*, 310 U. S. 371, 380 (1940); *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25 (1929).

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* Act of August 26, 1935, c. 687, 49 Stat. 856, U.S.C.A., Title 16, §825e.

** See note * *supra* p. 11.

Thus, in *Leighton* v. *Securities and Exchange Commission, supra*, this Court interpreted §20(a) of the Securities Act of 1933,* which provides that the S.E.C. "may investigate" the facts "whenever it shall appear to the Commission, either upon complaint or otherwise," that a violation of the Act has occurred. The Court held that:

> "Were we to assume that the action of the Commission in declining to entertain petitioner's complaint, or to investigate the matters pressed by him, constituted an order of the Commission nevertheless it would be one within the discretion of the Commission under Section 20 of the Securities Act and, in any event, not such an order as would be review-

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* Act of May 27, 1933, c. 38, 48 Stat. 86, U.S.C.A., Title 15, §77t(a).

> able by this court under Section 9(a) of the Act [which is essentially identical to §313(b) of the Federal Power Act, which provides for judicial review]. See Crooker v. Securities and Exchange Commission, 1 Cir., 161 F.2d 944, 949. The discretionary character of the Commission's action likewise removes it from Section 10 of the Administrative Procedure Act, which excepts from its provisions for judicial review agency action committed by law to agency discretion. The motion to dismiss accordingly will be granted." (95 App. D.C. at 218, 221 F.2d at 91-92)

The mere fact that the Commission did undertake a preliminary investigation to determine whether further proceedings under §206(a) were warranted clearly does not mean that it is required to go ahead and hold a hearing if, in its opinion, "no useful purpose" (Pet. to Rev., App., p. 5) will be served thereby. As this Court pointed out in *Herzog* v. *Parsons,* 86 App. D.C. 198, 181 F.2d 781 (1950), *cert. denied,* 340 U. S. 810 (1950), in dealing with a similar provision in the Labor Management Relations Act of 1947,* if it were otherwise, "the administrative proceedings of the Board would be hampered by the necessity of proceeding to a hearing on even the most frivolous of charges * * *." (86 App. D.C. at 204, 181 F.2d at 787)

It is thus very clear from the statute and the cases, as well as the remand, that PG&E's petition to review must be dismissed in so far as it seeks review of that part of the Commission's order which terminated the proceedings under §206(a).

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* Act of June 23, 1947, c. 120, 61 Stat. 149, U.S.C.A., Title 29, §160(k).

III

PG&E's contention that "the contract rate was not meant to be fixed for the term of the contract" (Pet. to Rev., p. 4), and that therefore its unilateral 1953 filing did change the contract rate, is barred by the judgment of this Court as affirmed by the Supreme Court, and is outside the scope of the remand to the Commission. Moreover, PG&E's statement that this contention "was not presented to the Supreme Court" is false.

This five-year litigation has directly or indirectly involved the attention of the Supreme Court of the United States, two United States Courts of Appeals, one Federal district court* and the Commission. Throughout this period and in every forum PG&E's unceasing objective has been to establish its right to change its contract by the unilateral 1953 filing of a higher rate.

One might have supposed this objective would have been abandoned after the Supreme Court concluded that "neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra." (350 U. S. at 353) That PG&E had no doubt as to what the Supreme Court had decided is evident from its statement to the Court, shortly after the decision, that: "* * * The

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* The Federal district court is the United States District Court for the Northern District of California, Southern Division, where Sierra is suing PG&E for restitution of the sums in excess of the contract rate unlawfully collected by PG&E from the date of the original Commission order to the Supreme Court's decision. That action has been stayed until final disposition of this proceeding, on the theory, which we believe to be erroneous, that the remand to the Commission meant to allow the Commission to proceed retroactively under §206(a).

Court has decided that the rate in question could not be changed through the process of a filing and proceeding under Section 205 of the Federal Power Act" (Appendix, 11a), its further statement that "We do not contest that * * * PG&E will be obligated to refund all of the increases collected from Sierra for the period *prior* to June 17, 1954" (Appendix, 12a), and its assertion that, "If the Commission finds in favor of Sierra that the contract rate is not against the public interest, the increase subsequent to June 17, 1954, must be refunded to it". (Appendix, 13a-14a)

Only five months later, however, after its "motion" to reopen on the public interest issue had been pending long enough to raise doubt as to its disposition, PG&E blatantly repudiated its advice to the Supreme Court and presented to the Commission an entirely different issue: its "basic contention" that it did have a right to change the contract by its unilateral filing because the contract "contemplates a changeable and not a fixed rate;" that on review of the initial Commission order "PG&E had no basis for insisting upon a court determination of its contention;" that the Commission should make a finding in support of the "basic contention;" and that "this finding would completely dispose of the case" by establishing that PG&E's unilateral 1953 filing of a higher rate had abrogated the contract rate. (Appendix, 15a, 16a, 17a, 21a)

We submit that merely to state the record of PG&E's irreconcilable advice to the Supreme Court and to the Commission sufficiently demonstrates that PG&E is not proceeding in good faith but merely for delay when it asks this Court, in the petition to review, to require a Commission hearing on the contention that the contract rate was not meant to be fixed for the term of the contract but was meant to be unilaterally changeable by PG&E. We further submit that the petition to review, in so far as it relies on this contention, should be summarily dismissed, for it is perfectly clear that PG&E is barred from urging this contention at this stage of the proceedings: first, because, contrary to PG&E's assertion, the issue has already been presented to the Supreme Court and decided adversely to petitioner, and second, because even assuming *arguendo* that the issue has not been previously adjudicated, it is too late for petitioner to raise it now.

PG&E's statement in the petition to review that the issue as to the meaning of the contract "was not presented to the Supreme Court for its determination" (Pet. to Rev., p. 10) is a plain misstatement of fact. In PG&E's reply brief before the Supreme Court, the concluding statement of PG&E's argument was as follows:

> "In a few words, neither Sierra nor public opinion were demanding a fixed rate, nothing in the situation required a fixed rate and *nothing in the negotiations, the contract, or the explanations of the contract in the 1948 proceeding ever suggested that a fixed rate had been discussed, much less agreed upon.*" (Appendix, 10a) (Emphasis added)

This summation was preceded by several pages of factual assertions to the same effect, including the following:

> "I. The Evidence Actually Shows That It Was Understood That the Purpose of the Term of the Contract was to Protect PG&E's Investment.
>
> * * *
>
> "To argue that PG&E consented to possible loss of all return for up to 30 years on a new investment

> in excess of one million dollars is absurd and contrary to the express testimony." (Appendix, 1a, 5a)
>
> "J. The Adoption of Schedule P-31 Charges Does Not Support Sierra's Contention That the Rate Was to Be Fixed for the Contract Term.
>
> * * *
>
> "Sierra would argue * * * that the Sierra rate is a fixed rate for the 15 to 30 year term of its contract. We have already shown that the conclusion does not follow because the 15 year term was proposed for protection of the new investment * * *." (Appendix, 6a)
>
> "Sierra was not * * * trying to extract from PG&E an agreement for an unchangeable rate." (Appendix, 10a)

The Supreme Court was obviously totally unimpressed with PG&E's contentions. Thus, it stated that "to forestall the potential competition, PG&E offered Sierra a 15-year contract for power at a special low rate, which offer Sierra finally accepted in June 1948." (350 U. S. at 352) In holding that the contract was binding upon PG&E despite the unilateral filing of a higher rate, the Court concluded that "neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra." (350 U. S. at 353) And, in discussing the §206(a) issue, it stated that "* * * it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return * * *." (350 U. S. at 355) A cursory reading of the opinion unequivocally indicates that the Supreme Court held that the contract before it was a fixed-rate contract, and rejected the assertions to the contrary.

Nor can PG&E gain any solace from the fact that the Court remanded the case to the Commission. It is only too obvious that the sole purpose of the remand was to enable the Commission, if it so desired, to make a determination under §206(a) as to "whether under the facts of this case the contract rate is so low as to have an adverse effect on the public interest * * *." (350 U. S. at 355) All other issues in this case were permanently closed by the Supreme Court's decision. For nothing is more clearly settled than that after the Supreme Court issues its mandate no contention or issue which might require a change in any part of the Supreme Court's original decision may be raised before a lower tribunal. *Briggs* v. *Pennsylvania R.R.,* 334 U. S. 304 (1948); *Kansas City So. Ry.* v. *Trust Co.,* 281 U. S. 1 (1930); *In re Potts,* 166 U. S. 263 (1897).

Thus, it is perfectly clear that any consideration by this Court of the contention that the contract rate was not meant to be fixed is barred by the judgment of the Supreme Court and completely outside the scope of the remand for "further proceedings, not inconsistent with this opinion, as the Commission may deem desirable."

Even assuming *arguendo* that the Supreme Court can be said not to have adjudicated the nature of the contract, it is hornbook law that PG&E cannot raise the issue now. PG&E's statement that on review it "had no basis for insisting upon a court determination of its contention" as to the meaning of the contract is just not true. (Appendix, 21a) The law is well settled that a decision below, whether of a court or of an agency, must be affirmed, even though the lower court or administrative body "relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran,* 302 U. S. 238, 245 (1937).

Thus, an appellee is permitted to present to the appellate court any contention which would sustain the decision appealed from, even though the argument was never mentioned or considered below. *Helvering* v. *Gowran, supra,* at 245-47; *Jaffke* v. *Dunham,* 352 U. S. 280 (1957).

Accordingly, PG&E, which initially prevailed before the Commission but supposedly on the wrong theory, was entitled to and bound to support the Commission's order, in this Court and in the Supreme Court, on any theory which it thought appropriate. Moreover, it was free to request and obtain any remand to the Commission which it could justify in the light of its conduct of the case. *Helvering* v. *Gowran, supra,* at 247. Thus, even assuming that the fixed-rate "issue" has never been decided by any court, petitioner is barred by elementary principles of res adjudicata from raising it now. For it is settled law that a judgment "is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac,* 94 U. S. 351, 352 (1876); see also *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371 (1940); *Grubb* v. *Public Utilities Commission,* 281 U. S. 470 (1930); *Baltimore S.S. Co.* v. *Phillips,* 274 U. S. 316 (1927); *United States* v. *California & Ore. Land Co.,* 192 U. S. 355 (1904).

Conclusion

It is now five years since PG&E breached its contract with Sierra and over two years since the Supreme Court held ineffective PG&E's attempt to change the contract rate by filing a schedule of higher rates. Yet PG&E still retains approximately $900,000 which it unlawfully collected under the Commission's invalid order of 1954, and in its present petition to review seeks the aid of this Court to establish that the filing made five years ago *was* effective to change the contract rate.

As we have shown, PG&E has no grounds for raising the issues sought to be presented in its petition to review. So that the Court may fully understand the nature of PG&E's actions, we would also like to point out that even if these issues were appealable as a matter of law, they are fictitious and sham as a matter of fact.

PG&E's contention that the contract rate is so low as to impair its ability to perform its service is ridiculous on its face, for, as appears from their own Submission (Appendix, 18a), the contract covers less than 1% of PG&E's gross electric business. The contention that the low rate could place a burden on PG&E's other consumers flies directly in the face of the California Commission's statement, quoted in this Court's opinion on the prior appeal, "that the special contracts were entered into '* * * *with the clear understanding that [PG&E's] * * * stockholders must bear any burden* * * *'." (96 App.D.C. at 141, 223 F.2d at 606) (Emphasis added) And as we have seen, the Commission, after investigation, has found that none of PG&E's other customers contends that the rate is unduly discriminatory.

Finally, as we have seen also, PG&E's contention as to the meaning of the contract is based upon the plain misstatement that no such issue was argued by it before the Supreme Court. We would point out also that

PG&E's contention that this issue was not so presented is a barefaced attempt to persuade this Court that its own decision on the prior appeal, as well as that of the Supreme Court, was rendered on a non-existent and moot issue.

We submit that PG&E's petition to review is not only non-appealable, sham and frivolous but in our judgment contemptuous of the prior decisions of this Court and of the Supreme Court of the United States. We submit also that it is plainly filed for the purpose of delay. As PG&E well knows, Sierra is now in need of additional power and is currently engaged in negotiating for such power with PG&E. The purpose of these proceedings is obviously to harass, impede and hamper Sierra in the course of such negotiations.

It is respectfully submitted, therefore, that regardless of any other issues presented, PG&E's petition should be dismissed on the ground that it is frivolous and sham, and made solely for the purpose of delay, and that Sierra should be awarded damages and double costs pursuant to Rule 23.

Respectfully submitted,

William C. Chanler,
Lawrence A. Baker,
40 Wall Street,
New York 5, New York,
Attorneys for Intervener,
Sierra Pacific Power Company.

Of Counsel:

Winthrop, Stimson, Putnam & Roberts,
40 Wall Street,
New York 5, New York,

J. Philip Bahn,
Stephen A. Weiner.

April 17, 1958.

APPENDIX

EXHIBIT A

Excerpts from PG&E's Reply Brief before the Supreme Court dated November 4, 1955, in *Federal Power Commission* v. *Sierra Pacific Power Company,* 350 U. S. 348 (1956).

* * * * *

[26]

I. THE EVIDENCE ACTUALLY SHOWS THAT IT WAS UNDERSTOOD THAT THE PURPOSE OF THE TERM OF THE CONTRACT WAS TO PROTECT PG&E'S INVESTMENT.

The direct and positive evidence of the contract itself and the virtually contemporaneous statements in the 1948 hearing before the California Commission prove that the purpose of the 15-year term was protection of the new investment in a 100,000 volt transmission line.

Two prior contracts, each of which called for a new transmission line, had 15-year terms. PG&E's first proposal to Sierra in 1947 was for a new line and a new 15-year term. The 15 years was accepted without discussion throughout the negotiations and without relation to the rate.

It is significant that the contract relates the 15-year term to the completion of the new 110,000 volt line and requires a new 15-year term to begin when a second such line is completed and placed in operation to meet Sierra's requirements.

When to this internal evidence of the contract is added the statements of both parties made before the present controversy arose there can be no doubt that the term of the contract was intended to protect their respective investments. As to the reason for the 15-year term, Mr. Pollard testified for PG&E before the California Commission in 1948:

> "Well, of course, that was—on our part was in order to guarantee that we would have business for a long enough period of time *to warrant us in making the investment* in the cost of the new line and amortizing it. And, furthermore, followed the same pattern as previous contracts we have had in each of which instances a substantial investment was made for service of this customer. And, similarly, 15-year contracts were taken at each of those times for that reason."[31]

In the same proceeding Sierra's president testified on the necessity for a 15-year contract as follows:

> "When load conditions are such that you have to have additional capacity it might be that that additional capacity could be arranged to carry you over for a short period—be sufficient to carry you over for a short period, but in case where you have to go to a relatively large investment it is only fair and business—proper business that the Company you are negotiating with *gets a proper return on the investment for that period.* That is the basis upon which we would operate ourselves, we would not expect anybody to go to a large investment which is necessary in order to give the Company capacity they need for any shorter period than that."[32]

In cross-examination, Sierra's president further said:

> "Q. This contract effectively ties Sierra's hands for 15 years, will it not?
>
> A. In what way do you mean?

---

31. R. 200, emphasis supplied.
32. R. 207, emphasis supplied.

[28]

> Q. Well, because of the fact that you are prohibited from developing any further power facilities of your own?
>
> A. No, I do not think that is true. The contract is worded in that way, if the parties have a modification that is justified I think the parties can get together on it. In other words, only the—the principal thing that the selling party would have—I might be corrected on this if I am wrong from P.G.&E. Company—would be idle investment. In other words, if we had a development that we found feasible and it came in at a time when any investment was [not][33] made idle by the P.G.&E. in other words, at a time when they might have to put in additional investment even to serve it, it would not penalize P.G.&E. if we went ahead on it and we could make arrangements with them to do so."[34]

In other words, Sierra believed that PG&E's primary concern was its investment and that a modification of the contract for Sierra's benefit would be justified under any circumstance where PG&E's investment was protected. If Sierra's president had exhibited the same reasonable attitude which he expected from PG&E in 1948 toward PG&E in 1952 when requested to renegotiate the present rate in accordance with the order of the California Commission[35] this proceeding would doubtless have been unnecessary.

In the present proceeding in 1953 Sierra's president testified that in his 1948 testimony before the California Commission he gave all the reasons which he could think of in support of the contract. The transcript of that proceeding will be scanned in vain for any indication that

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[33] The context requires insertion of the "not" at this point.

[34] R. 216.

[35] R. 61, 283, 285.

PG&E intended to give up any right to initiate a rate increase or that Sierra ever had any such understanding. Are we to

believe now that it was mere oversight that when the 15-year term was mentioned in 1948, Sierra's president thought only of a proper return for PG&E's investment rather than a guaranteed rate for Sierra, even though he was obviously looking for reasons to satisfy his Nevada opposition?

Not quite two years later, before the California Commission in 1950, Mr. Moulton, PG&E's vice president and executive engineer, explained the difference between the 15-year term of the Sierra contract and the 5-year term of other resale contracts as follows:

> "We finally made a 15-year contract with Sierra Pacific. *We made a longer contract because we under[took]*[36] *to build an additional line* to supply them and *we felt we needed that protection of a long contract."*[37]

Even in 1952, after Sierra had determined to oppose any increase by PG&E, Sierra's president before the California Commission on cross examination testified as follows:

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[36] The text has "understood" at this point, clearly a reporter's error.

[37] R. 273. Emphasis supplied. This testimony also shows that Sierra is completely mistaken in interpreting Mr. Moulton's testimony as support for its position that the contract rate could not be changed. Mr. Moulton recognizes that the purpose of the 15 year term was to protect the new investment. This testimony was given within a few months after initiation of service over the new 110,000 volt line to Sierra, and the fact that an increase was not deemed warranted at that time does not constitute a bar to an increase under conditions of greatly increased cost.

> "Q. Is it not a fact, Mr. Tracy, that Pacific Gas and Electric Company was insisting on a 15-year contract in order to protect it in a very large investment that it had to make in facilities in order to bring power to the summit to supply to the Sierra Power Company?
>
> A. I think that works both ways. Yes, our company wished to have a firm contract too to cover our investment." (Ex. 23, pp. 1418, 1419)

[30]

In the same proceeding Sierra's president also testified as follows:

> "Q. Now do you have any question in your own mind as to the right of this Commission to change or modify the terms of contracts made between a public utility and one of its customers?
>
> A. It is my understanding that the Commission has jurisdiction over rates, yes, sir.
>
> Mr. Orrick: I didn't hear that answer. Would you read that back, please? (Record read.)
>
> Mr. Duval: In having jurisdiction over rates, it can increase or decrease the rates, would you agree with that?
>
> A. I presume that."[38]

Protection of investment is not accomplished by ignoring diminishing returns. Failure to allow a fair return on property devoted to public utility service is confiscation of that property. To argue that PG&E consented to possible loss of all return for up to 30 years on a new investment in excess of one million dollars is absurd and contrary to the express testimony.

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[38] R. 329.

J. The Adoption of Schedule P-31 Charges Does Not Support Sierra's Contention That the Rate Was to be Fixed for the Contract Term.

When the present contract was being negotiated with Sierra in 1947 and 1948 PG&E had on file with the California Commission two tariffs of general application for intra-state resale electric service to customers who purchased all of their energy requirements from PG&E. One of these, Schedule P-31,[39] offered a rate approximately 10% below the other to resale customers who would enter into a five year contract for service. The contract with Sierra did

[31]

not incorporate the P-31 rate as such. It simply provided a schedule of demand and energy charges equivalent to those in effect under the P-31 tariff, plus a stand-by charge, and incorporated certain of the conditions of that tariff.

Sierra would argue first that the P-31 rate was established as a fixed rate for the term of each five-year contract and therefore that the Sierra rate is a fixed rate for the 15 to 30 year term of its contract. We have already shown that the conclusion does not follow because the 15 year term was proposed for protection of the new investment long before the P-31 rate entered into the negotiations. The premise that the P-31 rate could not be changed is equally unsound.

The California Commission has twice increased the P-31 rate since its adoption in 1945. The first occasion was in 1950 in response to PG&E's application for a 6% rate increase. The second occasion was in 1952 when the California Commission superseded Schedule P-31 by Schedule R, which is equivalent to the rate proposed in this proceeding. In each of those cases the Commission excepted from the increase certain named customers but the balance were required to pay the increased rate beginning with the effective date of the general increase regardless of the fact that they were being served under term contracts.[39a] This is

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[39] R. 299.

convincing evidence that the California Commission does not regard the P-31 rate as immune from changes when required by increases in the cost level.

The testimony of PG&E's rate engineer in 1945, to the effect that users of the P-31 rate were assured of the lower rate for a five-year term (quoted by Sierra in its brief at pp. 31, 49), sounds impressive when isolated from its context. We believe, however, that a study of the record of that proceeding will show that Mr. Beckett meant "lower than the P-6 resale schedule" and that he did not have in mind a fixed rate regardless of cost considerations. In any event the California Commission has set the matter at rest by granting the increases above described.

39a. As to the 1950 increase of 6%, Exhibit 18 shows that Pacific requested an increase in each of its filed schedules and was authorized to make such increase effective for service from April 15, 1950 subject only to the named exceptions. Pacific estimated that it would receive additional revenue of $140,000 annually from resale customers as a result of this increase.

As to the 1952 increase, Exhibit 17 shows that the California Commission authorized cancellation of all existing schedules and transfer of customers to the increased schedules applicable to the service rendered, including Schedule R for resale customers subject only to exception for certain listed contracts.

The exception of Sierra from the 1952 increase was expressly stated by the California Commission to be for the purpose of allowing an opportunity for the parties to renegotiate the contract "in the light of the new basic resale schedule," i.e. Schedule R (Ex. 17, p. 41). The refusal of Sierra to negotiate (T. 988) does not convert this exception into a final disposition of the matter by the California Commission. The matter is pending before that Commission in a new proceeding.

K. SIERRA DID NOT NEGOTIATE ON THE BASIS THAT AN ALTERNATIVE SOURCE OF POWER WAS ACTUALLY AVAILABLE.

Sierra never did act like a buyer playing one competitor against another. In October of 1947, Sierra's president explained to PG&E that his company was not prepared to continue negotiations, that there was local political pressure to bring Shasta power into Nevada which *hampered Sierra's* negotiation, and that Sierra could not afford to offend Shasta power advocates.[40] It is evident that PG&E was not given the impression that Sierra found anything desirable in the proposal for Bureau power. Instead, Sierra was making it clear that it was faced with public pressure urging "cheap" government power and ignoring the practical re-

[33]

quirements of the situation. The following testimony given by Sierra's president in this proceeding illustrates this point:

> "Q. Mr. Tracy, when Pacific Gas and Electric gave up the fuel escalator clause and submitted the proposed form of contract to you after the agreement on the demand and energy charge, what was your opinion as to why they were willing to give up that clause, which would have tended to protect them against at least one of the larger elements of risk in so long a term contract?
>
> [Objection by Mr. Searls on ground of irrelevancy overruled]
>
> * * * * *
>
> A. They did not inform me as to the reason and I certainly would not take it upon myself to guess.
>
> By Mr. Wahrenbrock. Q. Did you think you had outsmarted them on that?

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[40] R. 340.

> A. No. That isn't the correct answer. We thought that we had showed them sufficient reasons for proposing to us a lower rate.
>
> Q. Namely the threat of taking your load some place else.
>
> A. The potential competition that was *very prevalent. The papers were full of it.* As I testified before, all the groups were active. The Chamber of Commerce had a power committee."[41]

Notice that Mr. Tracy declined to state that he threatened to take his load elsewhere. To him the word "competition" seems to be synonymous with "public pressure" since he stated in his testimony that even after the contract with PG&E was signed and approved by the California Commission, he was bothered by "competition".[42]

[34]

In the face of all this evidence, which boils down to the fact that Sierra could not get the power it needed except from PG&E and the fact that any alternative was bound in the long run to mean high but uncertain costs when all factors were taken into account, Sierra's argument that it gave up a bargaining position or that either it or its customers have lost anything by making a contract with PG&E for service at a rate subject to regulatory change is without foundation.

"The papers were full" of competition and it was "very prevalent," but this sort of competition was more of a problem to Sierra than to PG&E. Sierra had no illusions about the desirability of a contract for Bureau power as is demonstrated by the intra-company communications which list Mr. Devore's or Mr. Tracy's objections to such an arrangement.[43]

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[41] Transcript, pp. 937, 938 (not printed).
[42] R. 54.

Sierra was not making fine calculations to determine the cost of various alternatives nor was it trying to extract from PG&E an agreement for an unchangeable rate. The 15-year term was important from the investment standpoint. Sierra endeavored to and did obtain the lowest available rate from PG&E but this was a standard rate, available to qualified resale customers whether or not they had competitive sources of supply.

PG&E undoubtedly felt the effect of the public pressure and concluded that it should offer its standard resale rate, the P-31 tariff, but it did not expect that this rate would be fixed in the face of cost changes.

When called upon at the California hearing in 1948 to justify making the contract with PG&E, Mr. Tracy attempted to educate the public representatives from Nevada to the facts of the situation which Sierra then faced. He

showed that he really had no choice in the matter. He did not claim that the 15-year term was agreed upon to secure a favorable rate; he explained that it was a necessary protection for the new investments to be made. The public representatives were satisfied with this and withdrew their opposition.

In a few words, neither Sierra nor public opinion were demanding a fixed rate, nothing in the situation required a fixed rate and nothing in the negotiations, the contract, or the explanations of the contract in the 1948 proceeding ever suggested that a fixed rate had been discussed, much less agreed upon.

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[43] R. 347-348, 350-351, 353-355.

EXHIBIT B

Excerpts from PG&E's Brief in Opposition to Motion to Amend and Supplement Last Sentence of the Court's Opinion, in *Federal Power Commission* v. *Sierra Pacific Power Company,* 350 U. S. 348 (1956).

[2]

* * * * *

I.

No amendment is necessary to clarify the Court's direction for further proceedings. Sierra is dissatisfied with the consequences, not the meaning, of the Court's order and, after the time to apply for a rehearing has expired, has moved for amendment in order to prevent the application of established principles of law and equity in such further proceedings—principles clearly enunciated by this Court itself in the only cases which deal directly with the subject at hand.

The situation in brief is this: The Court has decided that the rate in question could not be changed through the process of a filing and proceeding under Section 205 of the Federal Power Act. The Court observed, however, that if the proceeding satisfied in substance the requirements of Section 206(a), the manner in which it was begun was immaterial and that the Commission's order "if based on the necessary findings could have been effective to prescribe the proposed rate as the rate to be in effect prospectively from the date of the order, June 17, 1954". However, the Court declined to accept the Commission's conclusion that the contract rate was unlawful because it appeared "on its face to be based on an erroneous standard". After describing the general nature of the standard to be applied, the Court then stated that the application of the standard to the facts of this case is to be made in the first instance by the Commission. The Court "therefore" affirmed the order of the Court of Appeals which had set aside the Commission's order and gave instructions "to remand the case to the Federal Power Commission for further proceedings, not inconsistent with this opinion, as the Commission may deem desirable".

The court is now asked to decide whether Sierra is entitled to relief in the nature of restitution of the entire increase since it was placed in effect on September 6, 1953. In *Morgan* v. *U. S.*[1] a similar question as to restitution of money impounded in a rate proceeding was advanced as a ground to support a petition for rehearing of a decision declaring invalid a rate fixing order. The Court denied the petition, saying in effect that the question was premature.[2] Regardless of whether the Court would consider the question premature in the case at hand, we think the course to be followed here is so clear that amendment of the Court's opinion is unnecessary.

We do not contest that upon remand and when the judgment of this Court shall have finally become effective, PG&E will be obligated to refund all of the increase collected from Sierra for the period *prior* to June 17, 1954. This represents the increase collected during the pendency of the proceeding before the Federal Power Commission, under the provisions of Section 205 which the Court has held were not available to PG&E. In fact, although the Court's judgment has not become finally effective, PG&E has already refunded, on the basis of the Court's opinion, this amount with six per cent interest—a total of $382,022.37. This amount was tendered to Sierra and accepted without prejudice to whatever rights

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[1] 304 U.S. 1 (1938).

[2] 304 U.S. 1, 26. This case and the subsequent opinion of this court denying restitution are discussed in greater detail *infra,* pp. 6-7.

Sierra might have to refund of the increase collected from and after June 17, 1954.

The increase collected after that date is held by PG&E subject to final determination of the issues in this proceeding. Lest there be any doubt about the matter, we expressly declare that the latter amounts are being held subject to the disposition of this Court, or the court below in accordance with its jurisdiction, with the same effect as though this amount had been deposited with the court in accordance with a stay order.[2a] If either the Court or Sierra seriously questions the ability or willingness of PG&E to respond to the order of any court having jurisdiction with respect to disposition of the amount so retained and collected, PG&E hereby offers to deposit in court the amount of the increase subsequent to June 17, 1954, to be held until the matter is finally determined and to be disposed of thereafter in accordance with such determination.

II.

We respectfully submit that the determination of the rights of the parties in this proceeding must be made upon the basis of a finding of the Federal Power Commission as to whether the contract rate was in fact contrary to the public interest, applying the standards enunciated herein by this Court. As soon as the case is returned to the Commission PG&E intends to request the Commission to reopen the proceeding for the purpose of making a determination and findings on these issues. If the Commission finds in favor of Sierra that the contract rate is not against the public interest, the increase subsequent to

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[2a] No stay was requested by Sierra. Its position is therefore even weaker than that of the claimants to restitution of impounded moneys in *Morgan* v. *United States*, discussed *infra*, pp. 6-7.

(4, 5)

June 17, 1954, must be refunded to it. If the Commission finds in favor of PG&E that the contract rate was contrary to the public interest,

[5]

then there will be no reason in law or equity why PG&E should not be entitled to the increase from June 17, 1954.

* * * * *

EXHIBIT C

Excerpts from PG&E's Submission dated October 13, 1956, *Pacific Gas and Electric Co.*, FPC Docket No. E-6482.

[1]

* * * * *

SUBMISSION OF PACIFIC GAS AND ELECTRIC COMPANY

Pacific Gas and Electric Company asks the Commission[1] to make clearly lawful the rate known as Schedule F.P.C. No. 3, Supplement No. 1. This is the rate which the Commission found lawful in its opinion No. 270 of June 17, 1954, in Docket No. E-6482. That case, which was appealed, has been remanded to the Commission with instructions to take such further proceedings, not inconsistent with the Supreme Court's opinion, as the Commission may deem desirable[2].

The remand of the Court and both PG&E[3] and Sierra[4] have brought this matter again to the attention of the

[2]

Commission. PG&E by its motion of June 8, 1956, has asked the Commission to reopen Docket No. E-6482 and to make findings material to the issues raised by the Supreme Court's opinion. PG&E by its supplemental motion of October 10, 1956, has also asked the Commission to reopen Docket No. E-6482 in order to make findings material to PG&E's basic contention, yet undecided by the Commission, as to the true nature of the contract rate in question (Schedule F.P.C. No. 3). Sierra has asked the Commission by its complaint of July 20, 1956 (Docket

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[1] Federal Power Commission.

[2] *F. P. C.* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956).

[3] Pacific Gas and Electric Company.

[4] Sierra Pacific Power Company.

No. E-6697) to examine the question whether PG&E is presently charging an unlawful rate by charging Schedule F.P.C. No. 3, Supplement No. 1.

This submission amplifies and supports PG&E's motions for reopening and further hearing in Docket No. E-6482, and its answer in Docket No. E-6697. It states briefly the facts, the issues and the argumentation bearing on the issues. The argument will show—

(a) the Commission can and should act in this matter,

(b) the contract between PG&E and Sierra contemplates a changeable and not a fixed rate,

(c) the facts warrant the Commission making the findings needed to support its determination that Supplement No. 1 rates were and are lawful,

(d) Sierra has no basis for filing its complaint.

* * * * *

[17]

THE ISSUES PRESENTED TO THE COMMISSION.

There are now three proceedings which concern this Commission: (1) the remand of the main rate proceeding (Docket No. E-6482) by the Supreme Court, (2) the separate action in the District Court for restitution, and (3) the complaint proceeding brought by Sierra for charging of the rates in Supplement No. 1 to Schedule F.P.C. No. 3, (Docket No. E-6697, now consolidated with Docket No. E-6482 by order of the Commission issued September 7, 1956). In all of these proceedings the fundamental question is the same: what is the lawful rate to be charged Sierra for the electric service rendered it by PG&E?

The answer to this basic question depends first of all on the nature of the contract rate which PG&E has sought to have changed. If PG&E is correct in its basic contention that the contract rate was never intended by the parties to be a firm rate, but was intended to be subject to change in accordance with usual concepts to reflect changes in PG&E's costs of service for resale customers, then the Commission need merely find this to be the fact. This finding would completely dispose of the case, for the Commission has already by its order of June 17, 1954, not only found the old rate "unreasonable" and the new one "reasonable" according to usual concepts, but also found the new rate substantially the same as the rate charged

another utility for the only other resale service rendered by PG&E in interstate commerce. (PG&E's supplemental motion of October 10, 1956, for reopening in Docket No. E-6482 asks the Commission to make this finding and asks that additional evidence be taken as to the nature of the contract rate, including testimony of N. R. Sutherland, the President of PG&E, who participated in the final negotiations for the contract.)

On the other hand, should the Commission decide against PG&E's basic contention and also construe the Commission's approval of the 1948 contract as an approval of a contract rate intended to be *fixed* for a term of more than 15 years, then the Commission must apply a new concept of rate-making to the 1948 contract. Under this view, the Commission must apply the test laid down by the Supreme Court in determining whether the contract rate may be changed. This test, as stated by the Court, requires the Commission to determine whether the contract rate "is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory". (PG&E's motion of June 8, 1956, to reopen Docket No. E-6482 asks the Commission to make this determination.)

* * * * *

(Schedule 1, Sheet 1
Schedule 2, Sheet 1)

[Schedule 1, Sheet 1]

* * * * *

	1955 $	1956 $	
Revenue under [Sierra] Contract Rate * * *	1,946,536	2,200,878	* * * * *

* * * * *

[Schedule 2, Sheet 1]

PACIFIC GAS AND ELECTRIC COMPANY

Electric Department

* * * * *

(In Thousands of Dollars)

* * * * *

	1955 Recorded	1956 Estimated
Gross Operating Revenue	290,093	297,708

* * * * *

(1, 2)

EXHIBIT D

Excerpts from PG&E's Supplemental Motion dated October 10, 1956 for Reopening and Further Hearing, *Pacific Gas and Electric Co.*, F.P.C. Docket No. E-6482.

[1]

* * * * *

Supplemental Motion of Pacific Gas and Electric Company for Reopening and Further Hearing

In its Motion for Reopening and Further Hearing already on file herein, Pacific Gas and Electric Company, hereinafter called PG&E, asked that this proceeding be reopened to make certain findings relevant to the question whether the rate under Schedule F.P.C. No. 3 was so low as to have an "adverse effect on the public interest" under the decision in *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U. S. 348.

PG&E hereby makes this supplemental motion in accordance with the following:

[2]

1. During the previous proceeding before the Commission, Sierra took the position that the filing by PG&E on February 2, 1953, of its proposed new rate schedule under Section 205(d) of the Federal Power Act should be rejected because the contract between Sierra and PG&E precluded such a filing. Sierra argued that the rate specified in the contract was intended by the contracting parties to be a firm rate for the fifteen-year minimum life of the contract and that the only way such a firm contract rate could be changed was by a proceeding under Section 206(a).

(2, 3)

2. In answer to this argument, PG&E contended that the contract rate was not meant to be firm for fifteen years or longer but was meant to be subject to change upward or downward to reflect changes in PG&E's costs of service. Much evidence was adduced by both sides on this issue.

3. The Commission, however, considered it unnecessary to decide this issue and made no finding on it. It ruled that *any* contract rate even a fixed one such as Sierra contended this one was, could be superseded by a filing under Section 205(d). The Commission then went to

[3]

the merits of the case, found that the old rate had become unreasonably low, and issued its order allowing the increased rate.

4. As a party "aggrieved" by the Commission's order, Sierra sought a judicial review. On such review the Supreme Court held that the Commission's ruling that contracts could be superseded by filings made under Section 205(d) was erroneous and that the Commission's finding of unreasonableness of the old rate was erroneous because not based on appropriate standards for a firm contract rate. Although the Court had to *assume* for purposes of its opinion that the contract was for a firm rate, the Court did not *decide* that such was the nature of the rate. The Court merely disposed of the ruling that it made no difference whether or not the contract was for a firm rate (by saying in effect that it *did* make a difference in the standard to be applied for changing the rate) and sent the matter back to the Commission. It left undetermined the same question the Commission had left undetermined—the true nature of the contract rate.

5. Since Sierra was the party appealing from the Commission's order and since the Commission had made no

[4]

findings on PG&E's contention before the Commission, PG&E had no basis for insisting upon a court determination of its contention. Thus, PG&E's contention before the Commission (set forth in paragraph 2 above) has yet to be decided.

6. The Supreme Court has set aside the Commission's order and the case has been remanded "for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable." Under this remanding order the Commission may now decide the issues raised by PG&E's contention as to the nature of the contract rate.

7. In addition to the evidence already before the Commission[1] upon which PG&E will rely to support its contention that the contract rate was never intended by the parties to be a firm rate, PG&E deems it important to this Commission's complete understanding of this issue that additional evidence be presented in support of that contention, including the testimony of N. R. Sutherland, President of PG&E, who personally conducted the concluding

[5]

negotiations for the contract. This additional evidence will show that, as a consideration for the execution of the contract in the particular form it was executed, Sierra expressly represented to PG&E that it fully understood that the rate specified in the contract was subject to change upward or downward in accordance with changes in PG&E's standard resale tariff which was adopted as

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[1] See a review of this evidence set forth at pp. 16-40, Op. Br. of PG&E, and pp. 5-25, Reply Br. of PG&E, both in Docket E-6482.

(5)

the contract rate, and that, in reliance upon said representation of Sierra, PG&E executed the contract in a form which did not state the basis on which the rate specified in the contract could be changed.

Wherefore, PG&E prays, in addition to the prayer of its original Motion for Reopening and Further Hearing on file herein, that this Commission reopen this proceeding to receive additional evidence, hear further argument, and make findings material to PG&E's contention as to the meaning of the contract filed by PG&E as a tariff schedule in 1948 and approved by the Commission, with certain important qualifications, August 5, 1948.

Dated this 10th day of October, 1956.

Respectfully submitted,

Pacific Gas and Electric Company,

By N. R. Sutherland,
President and General Manager.

F. T. Searls,
John C. Morrissey,
Robert E. May,
Attorneys for Pacific Gas and Electric Company.

* * * * *

Affidavit of Service

State of New York }
County of New York } ss.:

J. Philip Bahn, being duly sworn, deposes and says:

1. I am an attorney and counsellor at law, admitted to practice by the Court of Appeals of the State of New York, and am associated with Lawrence A. Baker, Esq., 40 Wall Street, New York 5, New York, attorney for intervener, Sierra Pacific Power Company, and I reside at 488 Howard Avenue, Staten Island 1, New York.

2. I did on the 18th day of April, 1958, serve upon the parties to the above-entitled proceeding, namely, Pacific Gas and Electric Company, Petitioner, and Federal Power Commission, Respondent, the foregoing cross-motion of intervener by depositing copies of same in securely wrapped envelopes with prepaid airmail postage affixed in a United States Post Office mail box, addressed as follows:

Frederick T. Searls, Esq.
245 Market Street
San Francisco 6, California

Howard E. Wahrenbrock, Esq.
Solicitor
Federal Power Commission
Washington 25, D. C.

these addressees being respectively the attorneys for the parties to the above-entitled proceeding as appears to your deponent from documents and orders filed with this Court and with the Federal Power Commission in the proceedings below.

s/ J. PHILIP BAHN

J. Philip Bahn

Sworn to before me this 18th
day of April, 1958.

s/ FREADA A. COLEMAN

Freada A. Coleman
Notary Public, State of New York
No. 31-0703010
Qualified in New York County
Commission Expires March 30, 1959

REPLY MEMORANDUM OF INTERVENER ON ITS CROSS-MOTION TO EXERCISE JURISDICTION AND TO DISMISS PETITION TO REVIEW

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,422

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

SIERRA PACIFIC POWER COMPANY, *Intervener*

ON PETITION TO REVIEW ORDER OF FEDERAL POWER COMMISSION

William C. Chanler,
Lawrence A. Baker,
40 Wall Street,
New York 5, New York,
Attorneys for Intervener.

Of Counsel:
Winthrop, Stimson, Putnam & Roberts,
40 Wall Street,
New York 5, New York,
J. Philip Bahn,
Stephen A. Weiner.

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY - 8 1958

CLERK

IN THE

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No. 14,422

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner*

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REPLY MEMORANDUM OF INTERVENER ON ITS CROSS-MOTION TO EXERCISE JURISDICTION AND TO DISMISS PETITION TO REVIEW

I

PG&E's contentions that the Commission's order is appealable and that it is an aggrieved party are based upon such gross distortions of the record as to be sham and frivolous on their face.

The sham and frivolous nature of PG&E's petition to review could not be more conclusively demonstrated than by the distortions and misstatements of the record to which PG&E is driven in its effort to support its contentions that the Commission's order is reviewable and that it is an aggrieved party.

(a) PG&E's memorandum begins with the unsupported assertion that Sierra has engaged in a "shocking" reversal of position: "Having successfully argued before this Court and the Supreme Court that § 206, not § 205, of the Federal Power Act provides the machinery by which Petitioner must obtain rate relief, it now turns around and argues that § 206 does not provide the machinery after all because the utility has no right to make a complaint under § 206." (Memo., pp. 1-2)

An examination of the briefs before the Supreme Court shows that the shoe is on the other foot: Sierra's position before the Supreme Court was correctly set forth by PG&E itself in its reply brief in that court: "Respondent [Sierra] seems to acquiesce in [PG&E's] proposition that the Section 206(a) procedure is not available to the utility." (PG&E Reply Br. in Sup. Ct., p. 13) That, of course, is precisely Sierra's position today. It is PG&E which is reversing its position when it complains today that it has been deprived of a "constitutional right" (Memo., p. 6) to a hearing under § 206(a). For in the Supreme Court, it had insisted that the language of § 206 "certainly does not contemplate complaint by a public utility against itself." (PG&E Br. in Sup. Ct., p. 15)

Before the Supreme Court, Sierra described PG&E's position as follows:

> "[PG&E is] evidently laboring under the delusion that the power to abrogate contracts exists for the benefit of PG&E and that 'equity and good conscience' requires that PG&E be promptly relieved of its contract obligations whenever it seeks such relief. [It does] not seem to realize that it is only the *public* interest, and not the interest of PG&E's stockholders, that gives rise to the power to abrogate contracts." (Sierra Br. in Sup. Ct., p. 32)

That description is equally applicable to PG&E's position today. The only difference is that on the prior appeal, PG&E was contending that it had a right to be relieved of its contract under § 205 on the ground, among others, that it had no rights under § 206(a), whereas now that it has been defeated in that endeavor it turns around and claims that it does have a right to be relieved of its contract under § 206(a) after all. PG&E appears to be incapable of accepting the decision of the Supreme Court that it is "not * * * entitled to be relieved of its improvident bargain" (350 U. S. at 355) under either section. So far as PG&E is concerned, its contract is a contract. It is only the Commission, acting in the public interest under § 206(a) and not in PG&E's interest, that may set that contract aside.

(b) PG&E asserts that there was "no final order in Docket E-6482 until the order of July 10, 1957, which denied PG&E the right to increase its rates" and complains that "without a hearing, PG&E has been denied a rate increase. * * * What more is required to make a final administrative order appealable?" (Memo., pp. 3, 4, 5) Apparently PG&E expects this Court to ignore and forget its own decision, as well as that of the Supreme Court of the United States, entered in a proceeding to review the Commission's original order in Docket E-6482, that "neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra" (350 U. S. at 353). Thus it was the Supreme Court, and not the Commission, which "finally" denied PG&E a rate increase in Docket E-6482. That decision was handed down on February 27, 1956, yet PG&E is still contending that it has a right to ask the Commission to hold hearings for the purpose of determining whether it is entitled to that very rate increase!*

(c) PG&E repeatedly asserts that the Commission denied it a hearing although "specifically recognizing" that PG&E's "proffered showing indicated that the contract rate *may* adversely affect the public interest

---

* We are at a loss to perceive the significance of PG&E's contention that a proceeding under § 206(a) "was instituted by the Commission on its own motion in 1953 in Docket No. E-6482." (Memo., p. 2) The fact that such a proceeding may have been commenced in 1953 presents no reason why the Commission should reopen the proceedings and hold further hearings in 1957. But in any event, as this Court pointed out in its opinion on the prior appeal, the prior proceedings were commenced under § 205(e). (96 App. D.C. at 144, 223 F. 2d at 609) All the Supreme Court said on this question was that regardless of how the proceeding was initiated the Commission *could* have made a finding under § 206(a) in the same proceeding. (350 U. S. at 353) But as both that Court and this Court pointed out, the Commission did not do so—indeed in its Opinion No. 270 the Commission itself expressly held that it was unnecessary to do so. (*Pacific Gas and Electric Co.,* 7 P.U.R. 3d 256, 269 (1954))

* * *." (Memo., p. 4) In support of this assertion it quotes a part of a paragraph from the Commission's opinion discussing the relevance of PG&E's proffered showing. But PG&E omits the concluding sentence:

> "On their face, those studies show no more than that the Sierra business is somewhat less profitable to PG&E at the present time than at the time of the prior Commission proceedings." (Pet. to Rev., App., p. 7)

PG&E also fails to point out that the Commission's opinion thereupon takes up PG&E's offer of proof in detail and finds that "PG&E does not offer nor does it propose to offer any support for" its contentions that the rate is so low as to impair PG&E's financial ability to continue service, cast an excessive burden on PG&E's other customers, or be unduly discriminatory. (Pet. to Rev., App., p. 7)

Thus it is a complete distortion of the Commission's opinion to assert that it "recognized" that the low rate "may" adversely affect the public interest. On the contrary, what the Commission found was that PG&E offered to show only that the rate was unprofitable (a "subsidiary fact" the existence of which "may or may not impair PG&E's financial ability * * *," etc.) but offered no factual proof to establish "the *ultimate fact* to be ascertained": that the rate was in fact so low as to adversely affect the public interest. (Pet. to Rev., App., p. 7)

II

When read in the light of the record as it actually exists, the many cases cited in PG&E's memorandum will be found to be clearly irrelevant.

The cases cited by PG&E to support its contention that it is entitled to a hearing on "the unreasonableness of the contract rates" are completely irrelevant, since they all concern situations where the complaining party was expressly granted a *statutory right* to a hearing. Thus, in *Bel Oil Corporation* v. *Federal Power Commission,* F. 2d (5th Cir. 1958), which PG&E discusses on page 7 of its memorandum and relies on heavily, the issue was whether the Commission could refuse to hold a full hearing before entering an order denying a rate increase which had been duly filed by natural gas companies under §§ 4(d) and 4(e) of the Natural Gas Act* (which are essentially identical to §§ 205(d) and 205(e) of the Federal Power Act). Yet these sections specifically provide that a party who lawfully files a rate increase thereunder can be rebuffed by the Commission only "after full hearings".

Similarly, PG&E cites two cases where courts set aside NLRB orders finding employers guilty of unfair labor practices,** one case where the court set aside an order of the Board of Tax Appeals determining deficiencies in petitioner's income tax,† and one case where the court set aside an order of the Federal Maritime Board approving certain rate provisions.* In all these cases, the parties who obtained a judicial decision reversing the order and directing the agency to take further evidence had a *statutory right* to a hearing prior to the entry of the order finding against them on the merits. See National Labor Relations Act, § 10(b);** Internal Revenue Code of 1939, § 1116;*** Shipping Act, § 23.†

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* Act of June 21, 1938, c. 556, 52 Stat. 822, U.S.C.A., Title 15, § 717c.

** *National Labor Relations Board* v. *Burns,* 207 F. 2d 434 (8th Cir. 1953), discussed at p. 11 of PG&E's memorandum, and *National Labor Relations Board* v. *Tennessee-Carolina Transportation Co.,* 226 F. 2d 743 (6th Cir. 1955), discussed at p. 12.

† *Forrester Box Co.* v. *Commissioner,* 123 F. 2d 225 (8th Cir. 1941), discussed at pp. 12-13.

Significantly, PG&E does not discuss the many cases cited on page 13 of our cross-motion holding that a refusal of an agency to exercise jurisdiction under a statute such as § 206(a) is completely a matter of administrative discretion, and that such a decision cannot be judicially reviewed. To this list of cases may be added the recent Supreme Court decision of *Panama Canal Co.* v. *Grace Line, Inc.*, 26 U. S. L. Week 4264, decided on April 28, 1958, after the filing of Sierra's cross-motion. The Court held that, under a statute which "authorized" the Panama Canal Company to change "the tolls that shall be levied for the use of the * * * Canal,"‡ the refusal of the Company to prescribe new tolls could not be judicially reviewed, since "the initiation of a procedure for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co." (26 U. S. L. Week at 4266).

Sierra would also like to point out that PG&E has grossly misconstrued the Supreme Court case of *Ford*

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* *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S.D.N.Y. 1951), discussed at p. 14.

** Act of July 5, 1935, c. 372, 49 Stat. 453, U.S.C.A., Title 29, § 160.

*** Act of Feb. 10, 1939, 53 Stat. 160.

† Act of Sept. 7, 1916, c. 451, 39 Stat. 736, U.S.C.A., Title 46, § 822.

‡ Act of Sept. 26, 1950, c. 1049, 64 Stat. 1042, Canal Zone Code, Title 2, § 411.

Motor Co. v. *National Labor Relations Board,* 305 U. S. 364 (1938), discussed by PG&E at page 9 of its memorandum. In that case, the Court was concerned with the meaning of a remand " 'to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case' " (305 U. S. at 367 and 372). The remarks of the Court quoted by PG&E were directed solely and specifically to an interpretation of the language of this remand. That such a remand is an entirely different proposition from a remand "for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable" is too obvious to warrant further comment.

III

PG&E's contention that any issue as to the meaning of the contract is still open is based upon a complete distortion of the record in the prior proceeding.

PG&E's contention that it is entitled to a hearing and decision on the issue of the meaning of the contract is based on the assertion that it presented its arguments on this issue to the Commission on the prior hearing but that the Commission "refused and failed to make findings on the contract issue, erroneously determining instead that it was immaterial. In the absence of findings and a ruling on the contract issue, the issue was not presented to the Supreme Court for its determination." (Pet. to Rev., p. 10) This is as gross a distortion and misstatement of the record in the prior proceedings as are its other contentions.

In our cross-motion we point out that the statement that the issue was not presented to the Supreme Court is false, setting forth in the appendix to that motion some ten pages from PG&E's reply brief before the Supreme Court dealing exclusively with that issue. PG&E's only reply is that it advanced that contention in the Supreme Court only in "contravention in its closing brief of erroneous statements of 'fact' in Sierra's brief". (Memo., p. 31, n. 6) We agree that it was advanced in rebuttal, but we do not see what difference that makes. It is still true that the argument was presented to the Supreme Court.

Moreover, the record shows that the argument which PG&E presented to the Supreme Court was exactly the same as the argument it had presented before the Commission. *For the relevant portion of PG&E's reply brief before the Supreme Court is, with minor editorial changes, an exact reprint from its reply brief before the Commission**—(which is the brief in which PG&E claims that it presented the argument in that forum, Memo., p. 18, n. 5). If the argument was only advanced to rebut Sierra's statements of fact in the Supreme Court, the same must be true of its presentation before the Commission, and PG&E's assertion that it was advanced as an affirmative contention before that body is a pure fabrication. But whether the argument was presented in support of an affirmative contention or merely in rebuttal of Sierra's contentions is immaterial. Whichever way PG&E will have it, its assertion that the issue was presented to the Commission but not to the Supreme Court is as false as its other statements as to the record in these proceedings.

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* The reply brief before the Commission is reprinted at pages 1-27 of Exhibit A to our reply memorandum before the Ninth Circuit and is included in the papers transferred by that Court. Pages 9-15 and 22-25 of that reprint are almost identical to pages 1a-10a of the appendix to our Cross-Motion. These pages contain the relevant portions of each of the reply briefs.

Equally lacking in even a shred of support in the record are PG&E's assertions that the Commission "refused and failed to make findings on the contract issue, erroneously determining instead that it was immaterial." (Pet. to Rev., p. 10) *PG&E did not request the Commission to make a single finding relating to the contract,** and an examination of the Commission's extensive Opinion No. 270 will show that it does not contain a single word relating to any issue as to the meaning of the contract. See *Pacific Gas and Electric Co.*, 7 P.U.R. 3d 256 (1954).

We submit that the assertion that this issue was presented to the Commission by PG&E as an affirmative contention and that that body erroneously determined the issue to be immaterial and "refused and failed" to make any finding on it, is made of whole cloth from beginning to end. It is clear from the record that the issue is an afterthought advanced for the first time on October 15, 1956 (Cross-Motion, p. 5) as a last minute act of desperation when it became apparent that PG&E could not possibly succeed in its original attempt to show that the contract was against the public interest.

But whatever the correct interpretation of the record may be, we think it is perfectly plain that the issue is barred. If the issue was before the Supreme Court, it was decided adversely to PG&E's present contention. If it was not presented, it is too late for PG&E to raise it now. For, concededly, PG&E's only purpose in raising the issue is to obtain a decision that its 1953 filing was effective to change the contract rate. But, as PG&E's Memorandum concedes, the effectiveness of the unilateral 1953 filing is exactly the first question which the Supreme Court considered:

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* The requested findings are reprinted at pages 26-27 of Exhibit A to our reply memorandum before the Ninth Circuit. As the Court will observe, PG&E's requests do not even mention the existence of the contract and relate solely to the reasonableness of the proposed rate—and these findings were accepted by the Commission.

> "The first question before us is whether PG&E's unilateral filing of the new rate under § 205 (d), and the approval of the new rate by the Commission under § 205 (e), were effective to supersede PG&E's contract with Sierra." (350 U. S. at 352)

And the Court's decision of that question, we submit, is decisive of this entire controversy:

> "* * * We think not. * * * [W]e conclude that neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra." (350 U. S. at 353)

When this decision is borne in mind, the case most extensively relied upon by PG&E (*Mutual Life Ins. Co. v. Hill,* 193 U. S. 551 (1904)) will be seen affirmatively to support our point that PG&E's "basic contention" is barred by the decision of this Court, as affirmed by the Supreme Court, and is outside the scope of the remand to the Commission. Thus, in the *Hill* case the Court pointed out:

> "* * * the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any *other than the questions in terms discussed and decided.* An actual decision of any question settles the law in respect thereto for future action in the case." (193 U. S. at 553-54. Emphasis added.)

The first question presented to the Supreme Court in PG&E's petition for certiorari was:

> "Does the rate filing procedure prescribed by Section 205 of the Federal Power Act for obtaining a

> rate increase apply to Petitioner's rate for electric power service to Sierra Pacific Power Company, *such rate being embodied in a contract between the two companies?*" (PG&E Pet. for Cert., p. 2. Emphasis added.)

When, as PG&E itself puts it, the Supreme Court "decided that the rate in question could not be changed through the process of a filing and proceeding under Section 205,"* that was a final adjudication as to the ineffectiveness of the unilateral 1953 filing, for that was "the question in terms discussed and decided" by the Supreme Court. PG&E, which never requested a contrary finding from the Commission, cannot now be heard to contend that the rate was not "embodied in a contract", and elaborate its changeable rate argument as a new theory in order to establish that the unilateral 1953 filing *was effective* to change the contract rate. *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371 (1940); *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316 (1927); *United States* v. *California & Ore. Land Co.,* 192 U. S. 355 (1904).

The utter absurdity of PG&E's present position is further demonstrated by its insistence that it should be permitted to call Mr. Sutherland to testify as to the negotiation of the contract. At the prior hearings PG&E's witness Pollard testified that it was Mr. Sutherland and not he who had carried on the negotiations.** On the oral argument before the Commission, in discussing Mr. Sutherland's activities in connection with the negotiations, Sierra's counsel said:

> "[I]f they [PG&E] want Mr. Sutherland's testimony * * *, he's their Vice President, and I

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* See our Cross-Motion, page 11a, quoting PG&E's Supreme Court Brief in Opposition to Motion to Amend and Supplement Last Sentence of the Court's Opinion.

** Transcript of Record, *Pacific Gas and Electric Co.,* 7 P.U.R. 3d 356 (1954), pp. 307, 825-26.

> believe he is still available if they want him to testify." (Transcript of Record, *Pacific Gas and Electric Co.,* 7 P.U.R. 3d 356 (1954), p. 1456.)

PG&E has had its hearing as to the meaning of the contract. Surely it doesn't seriously contend that it is now entitled to a new hearing of the same issue in order to call a witness which it had failed to call. "We cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence." *Colorado Radio Corp.* v. *Federal Communications Commission,* 73 App. D.C. 225, 227, 118 F. 2d 24, 26 (1941).

When PG&E's Memorandum is stripped of the repeated misstatements and distortions of the record, it is apparent that none of the imposing array of cases cited by it on the subject of res judicata, law of the case, etc. have any relevance whatever. Surely the law as laid down in *In re Potts* and the other cases cited at pages 19-20 of our cross-motion sustains the proposition that when the Supreme Court has held that a seller cannot change a rate embodied in a contract without the purchaser's consent, the seller cannot later seek to relitigate that very issue, whether on a ground that was advanced in the earlier proceeding or on a ground that was not.

Conclusion

We submit that PG&E has not advanced a single statement of a material fact as to the record in these proceedings which will survive even a cursory examination of that record. No doubt, PG&E hoped that it could cause sufficient confusion before the Court of Appeals for the Ninth Circuit, which was wholly unfamiliar with the background of this litigation, to cause extensive delay in the determination of the truth of its statements. But whatever its purpose it must be apparent that, absent its distortion of the record, there is not even a plausible argument which PG&E can produce in support of its petition to review. We submit that it can only have been filed for the purpose of delay.

That any delay is grievously damaging to Sierra is obvious. PG&E has obtained a stay of Sierra's action for restitution of over $900,000 due Sierra under the Supreme Court's decision, until all possible appeals from the Commission's order herein sought to be reviewed have been terminated. In addition to depriving Sierra of funds unlawfully collected from it under the Commission's invalid order, the pendency of this litigation, which involves the future cost of almost its entire supply of electric energy, is extremely embarrassing. As pointed out in our cross-motion, Sierra is presently confronted with the necessity of negotiating for still further power to supply its growing demands.

We submit that PG&E's petition to review should be rejected on the ground that PG&E is not aggrieved by the Commission's order, the order is not app~~lic~~EALable, and the petition is sham and frivolous. We submit further that Sierra should be awarded damages and double costs because it is apparent that the only purpose of PG&E's procedure is to delay a final determination of the controversy.

Respectfully submitted,

William C. Chanler,
Lawrence A. Baker,
40 Wall Street,
New York 5, New York,
Attorneys for Intervener,
Sierra Pacific Power Company.

Of Counsel:
Winthrop, Stimson, Putnam & Roberts,
40 Wall Street,
New York 5, New York,

J. Philip Bahn,
Stephen A. Weiner.

May 8, 1958.

Affidavit of Service

State of New York ⎫ ss.:
County of New York ⎭

J. Philip Bahn, being duly sworn, deposes and says:

1. I am an attorney and counsellor at law, admitted to practice by the Court of Appeals of the State of New York, and am associated with Lawrence A. Baker, Esq., 40 Wall Street, New York 5, New York, attorney for intervener, Sierra Pacific Power Company, and I reside at 488 Howard Avenue, Staten Island 1, New York.

2. I did on the 8th day of May, 1958, serve upon the parties to the above-entitled proceeding, namely, Pacific Gas and Electric Company, Petitioner, and Federal Power Commission, Respondent, the foregoing reply memorandum of intervener by depositing copies of same in securely wrapped envelopes with prepaid airmail postage affixed in a United States Post Office mail box, addressed as follows:

Frederick T. Searls, Esq.
245 Market Street
San Francisco 6, California

Howard E. Wahrenbrock, Esq.
Solicitor
Federal Power Commission
Washington 25, D. C.

these addressees being respectively the attorneys for the parties to the above-entitled proceeding as appears to your deponent from documents and orders filed with this

Court and with the Federal Power Commission in the proceedings below.

S/ J. Philip Bahn

J. Philip Bahn

Sworn to before me this 8th
day of May, 1958.

S/ Freada A. Coleman

Freada A. Coleman
Notary Public, State of New York
No. 31-0703010
Qualified in New York County
Commission Expires March 30, 1959

CHAMBERS OF JUDGE BAZELON

RECEIVED
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CLERK OF THE UNITED
STATES COURT OF APPEALS

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15773

No 14422

PACIFIC GAS & ELECTRIC COMPANY,
Petitioner,
v.
FEDERAL POWER COMMISSION,
Respondent,
SIERRA PACIFIC POWER COMPANY,
Intervener.

MEMORANDUM IN REPLY TO PETITIONER'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS PETITION FOR LACK OF JURISDICTION

WINTHROP, STIMSON, PUTNAM & ROBERTS,
40 Wall Street,
New York 5, N. Y.

BROBECK, PHLEGER & HARRISON,
111 Sutter Street,
San Francisco 4, California,
Attorneys for Intervener.

WILLIAM C. CHANLER,
Of Counsel.

FILED
DEC 23 1957
PAUL P. O'BRIEN, Clerk

IN THE

United States Court of Appeals

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Intervener.

MEMORANDUM IN REPLY TO PETITIONER'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS PETITION FOR LACK OF JURISDICTION

In the "Points and Authorities" contained in the memorandum of petitioner (PG&E) filed in opposition to the motions filed by the intervener (Sierra) and the respondent Federal Power Commission (the Commission) to dismiss the petition to review herein, PG&E argues first that the question of the circuit in which a petition to review an administrative order may be brought is one of venue and not of jurisdiction. Secondly, in an effort to distinguish the *Hicks* and *Morris* cases, PG&E argues that the Commission's order sought to be reviewed herein was issued pursuant to the mandate of the Supreme Court (*FPC* v. *Sierra Pacific Power Co.,* 350 U. S. 348 (1956)) and not the mandate of the Court of Appeals for the District of Columbia Circuit (*Sierra Pacific Power Co.* v. *FPC,* 223 F. 2d 605 (D.C. Cir. 1955)), and that it deals with entirely different issues of fact and law than did the earlier order which was set aside by those courts.

I

The issue here is one of jurisdiction and not of venue.

PG&E's contention as to venue is readily disposed of: while it is true that the initial choice of the circuit in which to review administrative proceedings is a matter of venue, the law is clear that after one circuit has taken jurisdiction, its jurisdiction is exclusive, and extends to a review of an order issued pursuant to a remand issued on the initial review. We think this is amply illustrated by our citation of the *Hicks* and *Morris* cases in our Points and Authorities.

PG&E seeks to distinguish the *Morris* case on the narrow and technical ground that there a mandate of a court of appeals was involved while in the case at bar the mandate of the Supreme Court is involved; and to bolster that meaningless distinction with the argument that the District of Columbia Circuit is no better equipped than this Court to decide the issues presented by this appeal. As to the supposed ground of distinction, to meet technicality with technicality, it is necessary only to point out that it *is* the mandate of the District of Columbia Circuit which must be construed in this appeal and on that point the *Morris* case is entirely clear and unequivocal:

> "We cannot believe that an appellate court of another jurisdiction can determine whether a mandate of the appellate court first acquiring jurisdiction was properly followed." (116 F. 2d at 898)

With respect to the argument that the District of Columbia Circuit is not better prepared to determine the issues on this appeal than is this Court, we refer the Court to the annexed affidavit of William C. Chanler from which it is apparent that all the issues in controversy under the petition to review involve conflicting contentions as to the effect and construction of the proceedings before the District of Columbia Circuit as they may be affected by the proceedings before the Supreme Court. Sound judicial administration, as well as the clear law of the *Morris* case, require this appeal to be heard by the District of Columbia Circuit.

PG&E's attempt to distinguish the *Hicks* case is again a technical and narrow one. Its argument is simply this: the *Hicks* case involved two appeals from the same administrative order; this case involves two administrative orders; therefore the *Hicks* case does not apply. Neither the facts of this case nor the meaning of the *Hicks* case is as simple as that. The Supreme Court clearly held in the case at bar that determinations under Sections 205 and 206 of the Federal Power Act would both be parts of the same proceeding. Indeed, the order here sought to be reviewed is based in part on the record made in the proceeding already reviewed by the District of Columbia Circuit. And the meaning of the *Hicks* case (quoted at page 13 of our Points and Authorities) is clearly that the court of appeals first taking jurisdiction of part of an administrative proceeding thereby acquires exclusive jurisdiction over all parts of that proceeding.

It is clear that the District of Columbia Circuit, having first acquired jurisdiction of part of this controversy, has thereby acquired exclusive jurisdiction of the entire controversy and is the only forum that can hear this appeal. No other conclusion would be compatible with efficient judicial administration and the intent of Congress. As the Court of Appeals for the Second Circuit expressly pointed out in the *Morris* case, "The appeal taken * * * from [the first Commission] order * * * gave the first circuit 'exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part' * * *. *We cannot doubt that it has exclusive jurisdiction to determine the character of the order to be entered upon its mandate*" (116 F. 2d at 898). (Italics added.)

II

It is clear from the history of the litigation out of which the present petition arises that the order here sought to be reviewed arises from the mandate of the Court of Appeals for the District of Columbia Circuit as affirmed in slightly different form by the Supreme Court of the United States, and that the issues on this appeal relate exclusively to a construction of that mandate and of the opinions of the Court of Appeals and Supreme Court in the prior proceedings.

Because of the aforementioned points raised by petitioner in its memorandum regarding the nature and origin of the order under review, it became necessary for counsel on the oral argument to outline the history of the litigation, and in doing so, to go somewhat beyond the record presently before the Court. In his reply counsel for PG&E took exception to this "excursion outside the record" but also challenged the correctness of many of the statements made by Sierra's counsel. It of course is not for this Court at this time to determine the merits of these controversies. Their significance so far as this motion is concerned is that, as they go largely to the merits of the issues raised by the petition to review, they conclusively demonstrate our basic contention that the decision of those issues would require this Court not only to review and pass upon the mandate issued by the Court of Appeals for the District of Columbia Circuit under the directions of the Supreme Court and determine what was or was not decided in the decisions of those courts, but also to determine the several issues as to the extent, if any, to which the Supreme Court's opinion differed from that of the Court of Appeals, whose order the Supreme Court affirmed.

However, in order to complete the record, an affidavit is annexed hereto primarily so that this Court may have before it excerpts from the record upon which the statements made during oral argument were based. No doubt counsel for PG&E in its reply will again take issue with the conclusions drawn as to what that record may disclose, and, more particularly, as to the meaning and effect of the mandates of the Supreme Court to the Court of Appeals for the District of Columbia Circuit and of that Court of Appeals to the Federal Power Commission. If they do so, we submit that that will conclusively demonstrate that these issues can properly be determined only by the Court of Appeals for the District of Columbia Circuit.

Moreover, even if the factual disputes developed at the oral argument were not in existence, decision on PG&E's

appeal would still require a construction of the mandate of the Court of Appeals for the District of Columbia Circuit. It is our contention that the sole reason for remanding the case to the Commission was to authorize the Commission if it so desired to hold proceedings on the basis of the existing record instead of instituting a new proceeding. Such a remand gave PG&E no right to do other than request the Commission to reopen. The Commission's denial of such a request addressed to its sole discretion is in our judgment non-appealable. PG&E, on the other hand, has contended throughout that the remand required the Commission to hold further hearings and make further findings. Clearly, there is a controversy necessarily involving a construction of the remand.

CONCLUSION

The petition to review should be dismissed.

Respectfully submitted,

William C. Chanler,
Winthrop, Stimson, Putnam & Roberts,

Gregory A. Harrison,
Brobeck, Phleger & Harrison,

William C. Chanler,
Attorneys for Intervener,
Sierra Pacific Power Company.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing copies thereof properly addressed to:

Howard E. Wahrenbrock, Esq. (Via Air Mail),
Solicitor, Federal Power Commission,
Washington 25, D. C.

F. T. Searls, Esq. (Via Air Mail),
245 Market Street,
San Francisco 6, California.

....

Of Counsel,
Sierra Pacific Power Company.

December 21, 1957.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15773

Pacific Gas and Electric Company,
Petitioner,
v.
Federal Power Commission,
Respondent,
Sierra Pacific Power Company,
Intervener.

AFFIDAVIT

State of New York }
County of New York } ss.:

William C. Chanler, being duly sworn, deposes and says:

I am one of the attorneys for the intervener herein, Sierra Pacific Power Company (Sierra), and make this affidavit on the basis of personal knowledge of all proceedings out of which the order sought to be set aside arises. The proceedings before the Federal Power Commission bear Docket Nos. E-6482 and E-6697, and the opinions of the courts resulting from those proceedings are reported as *Sierra Pacific Power Co.* v. *FPC,* 223 F. 2d 605 (D.C. Cir. 1955), *modified,* 237 F. 2d 756 (1955), and *FPC* v. *Sierra Pacific Power Co.,* 350 U. S. 348 (1956), *motion denied,* 351 U. S. 946 (1956). The petitioner herein, Pacific Gas and Electric Company (PG&E) was a party to all the proceedings referred to. The Federal Power Commission is hereinafter referred to as the Commission.

As stated in the memorandum preceding this affidavit, the purpose of this affidavit is to substantiate statements made by me in the oral argument before this Court and to demonstrate that the issues on PG&E's petition to review cannot be decided without construing the mandate of the Court of Appeals for the District of Columbia Circuit in the *Sierra* case.

1. The basis of my oral statement as to the facts leading up to the original Commission order of June 17, 1954, which was disputed by opposing counsel, is contained in the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Pacific Power Co.* v. *FPC, supra* at 606. In its opinion, that Court succinctly stated the facts as follows:

> "In 1938, Pacific Gas and Electric Company, a public utility under the laws of California, and Part II of the Federal Power Act, entered into its second 15-year contract to sell electric energy to Sierra Pacific Power Company, a public utility under the laws of California and Nevada. With the end of World War II, it became apparent that before expiration of this contract in 1953 Sierra's rapidly increasing demands would require either the construction of an additional transmission line into its area by P G & E, or the development of a

new source of power. Accordingly, in 1947 Sierra commenced negotiations with P G & E and the Bureau of Reclamation which offered to furnish power from Shasta Dam.

At first P G & E offered a 15-year contract at the 1938 contract rates but with an 'escalator fuel clause.' Sierra rejected this and turned to intensive negotiations with governmental agencies for 'cheap Government power.' P G & E then proposed a lower rate (the so-called P-31 schedule) for the same term without the escalator clause. This proposal was accepted in June 1948 and embodied in a contract which was duly filed with the California Public Service Commission and the Federal Power Commission. The P-31 schedule was a lower rate approved by the California Public Service Commission (formerly Railroad Commission) to enable P G & E to retain business of customers that would otherwise 'be lost altogether' to public power competition. But a significant condition of this approval was that any loss from such service would be borne by P G & E's stockholders and not by its other customers.

In 1952, however, when public power from Shasta Dam was no longer available to Sierra, P G & E sought the California Commission's approval for rate increases for Sierra and other customers under the P-31 schedule [Note 2: "With the significant exception of one city [Redding] which could still have utilized Shasta Dam power."] The Commission refused on the ground that the special contracts were entered into 'in order to forestall alleged government competition and with the clear understanding that its stockholders must bear any burden * * *.' In February 1953, in a further effort to increase its rates, P G & E filed the schedule of increased rates in question here with the Federal Power Commission under §205 of the

> Federal Power Act. Sierra thereupon intervened. It urged that §205, which provides for Commission approval of newly proposed rates merely upon a finding that they are reasonable, is not applicable where, as here, approval would effect unilateral abrogation of a duly filed rate contract; that to effect such abrogation the Commission must first make the determination, provided for in §206(a), that the rate contract to be superseded is 'unjust, unreasonable, unduly discriminatory or preferential * * *.' "

2. The authority for my statement that the California Public Utilities Commission refused to permit PG&E to increase its contract rate with Sierra in 1952 on the ground that the rate had been entered into for the purpose of meeting competition, which statement was challenged on the oral argument, is found not only in the reference thereto in the foregoing statement of the Court of Appeals for the District of Columbia Circuit, but also in the following statement of the California Public Utilities Commission in its order refusing to allow such increase:

> "Among the special resale contracts which applicant seeks to alter in this proceeding is one involving the sale of electric energy at wholesale to Sierra Pacific Power Company at the Sierra summit. The present contract, dated March 4, 1948, was approved by this Commission in Decision No. 41537. This agreement was a renegotiation of prior contracts extending as far back as 1923 covering this point of delivery. The contract covered, in addition to rate structure, other features of delivery including building of additional lines on the part of both parties and the establishment of a contract term of fifteen years to provide protection to both parties. This contract was concluded after negotiations extending over about a year's time. * * *"

* * * * *

> "In connection with these special contracts, we point out that the applicant [P G & E] *in order to forestall alleged government competition,* requested authority from this Commission to enter into said contracts with the clear understanding that its stockholders must bear any burden which the applicant might sustain as a result of the operation of any such contracts. Therefore, equity calls for the treatment which we have accorded to these special contracts." (*Re* Pacific Gas & Electric Company, 96 P.U.R. (N.S.) 493, 524-526 (October 15, 1952)) (Italics added)

The foregoing order was introduced as Exhibit 17 in Docket No. E-6482 before the Commission.

3. As authority for my statement on the oral argument that the meaning of the rate contract between Sierra and PG&E had not been "left open" by the Commission and had not remained undetermined, as contended by counsel for PG&E, I refer, first, to PG&E's petition for a writ of certiorari in *FPC* v. *Sierra Pacific Power Co., supra.* In that petition, under "Questions Presented", Mr. Searls, PG&E's chief attorney in the present case, stated:

> "1. Does the rate filing procedure prescribed by Section 205 of the Federal Power Act for obtaining a rate increase apply to Petitioner's rate for electric power service to Sierra Pacific Power Company, *such rate being embodied in a contract between the two companies?*" (Italics added)

Secondly, in its opinion in the *Sierra* case the Supreme Court, after referring to the availability of power from Shasta Dam at the time of negotiation of the Sierra-PG&E contract, said:

> "To forestall the potential competition, PG&E offered Sierra a 15-year contract for power at a special low rate, which offer Sierra finally accepted in June 1948." (348 U. S. at 352)

Thirdly, the Supreme Court concluded in that opinion, on the basis of its decision reached the same day in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956), "* * * that neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra." This holding was the same as that made on the same point by the Court of Appeals for the District of Columbia Circuit in its opinion below, and it was this holding by which the Commission found itself bound in the order sought to be reviewed when it said, "* * * in our view the Supreme Court's decision in this matter must be taken as disposing of PG&E's contention concerning the contractual obligation of the parties under the 1948 contract with respect to rates". It is plain, therefore, that in asking this Court to find that the Commission erred in refusing to take parole testimony for the purpose of showing that the rate was not "embodied" in a contract and could be changed by PG&E's unilateral filing of a higher rate, PG&E is attempting to have this Court reverse a decision of the Court of Appeals for the District of Columbia Circuit and affirmed by the Supreme Court of the United States, and to have this Court force the Commission to take action that in the Commission's view would be contrary to the mandate to it from the Court of Appeals for the District of Columbia Circuit.

4. I stated at the oral argument that PG&E's petition to review herein erroneously asserted at page 4 that "The

F.P.C. determined that it was unnecessary to decide whether the contract was for a fixed or changeable rate and made no finding on that issue''. There is not a word in the Commission's order of June 17, 1954 (which is set forth as Exhibit ''B'' to PG&E's memorandum in opposition) from which one could draw even an inference that the Commission ever made any such ''determination'' or was aware of the existence of such an ''issue''. Nor did PG&E include any request for such a ''finding'' in the ''Requested Findings'' which it submitted to the Commission before the order issued and which are set forth on pages 26-27 of Exhibit A hereto. As will be noted from an examination of those ''Requested Findings'', PG&E was simply asking the Commission to make the very findings which formed the basis of the reversal of the Commission's order by the courts. The contention that PG&E's principal contention before the Commission related to the meaning of the contract but that the Commission refused to make a finding on that issue is pure fiction.

The petition to review correctly states, however, that PG&E ''contended that the contract rate was not meant to be fixed for the term of the contract, but was intended and understood by the parties to be subject to change if Pacific's costs of service changed, subject, of course to regulatory approval'' (Pet. to Rev. p. 4). Pages 5 to 15 and 19 to 25 of Exhibit A hereto, which is a true and complete copy of PG&E's reply brief before the Commission in 1954, show the detail in which this contention was made. But as appears both from the fact the argument was primarily contained in a reply brief, and from the point headings contained therein, and as is conceded in the petition to review at page 4, this argument was not advanced as an affirmative contention but in reply to Sierra's contention that it was so well understood that the contract *did* provide for a fixed term that as a matter of equity the Commission should not permit PG&E to violate its contract, even if the Commission deemed that it had the legal right to do so.

Moreover, what the petition to review fails to state is that PG&E presented the very same contention to the Courts, which passed upon it and decided it adversely to PG&E. For example, pages 26 (middle) to 35, inclusive, of PG&E's reply brief before the Supreme Court of the United States were, with minor editorial changes, exact copies of pages 9 to 15 and 22 to 25, inclusive, of the reply brief before the Commission set forth as Exhibit A hereto. Thus the "issue" as to the meaning and intent of the contract which PG&E now seeks to raise in this Court was fully litigated and decided by the Courts in the original proceeding.

5. PG&E contends that the Supreme Court "reversed" or substantially changed the decision and mandate of the Court of Appeals for the District of Columbia Circuit and that therefore the Commission's order now sought to be reviewed was issued solely pursuant to that mandate and not that of the Court of Appeals.

The last sentence of the opinion of the Supreme Court reads as follows:

> "We shall therefore affirm the order of the Court of Appeals, with instructions to remand the case to the Federal Power Commission for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable." (350 U. S. at 355)

It is true, as urged by PG&E, that the form of this mandate differed somewhat from the last sentence of the opinion of the Court of Appeals which, was modified on Sierra's motion to read as follows:

> "For the foregoing reasons, the order under review is set aside and the case remanded to the Commission with instructions to dismiss the proceeding, without prejudice to the initiation of a new proceeding under §206(a)." (237 F. 2d at 756)

But, as indicated on the oral argument, this difference arose from the following two circumstances:

A. In referring to the Commission's statement in its order of June 17, 1954, to the effect that if it were necessary to make such a finding it would have to find "that the 1948 rate is unreasonably low and therefore unlawful", the Court of Appeals said:

> "This statement, however, is based entirely upon a record made in a proceeding under §205(e) in which the unreasonableness of the contract rate was not in issue." (223 F. 2d at 609)

The Supreme Court on the other hand pointed out that there was no such thing as a different "proceeding" under Section 205(e) or Section 206(a) of the Federal Power Act; that these sections merely set forth the powers of the Commission which the Commission could exercise in any hearing, and that therefore if the Commission had made proper findings it could have set aside the contract as against the public interest in the original proceeding, regardless of whether or not it had been commenced under Section 205(e). Accordingly, the Court of Appeals' attempt to differentiate between the two types of "proceedings" was no longer appropriate.

B. As stated at the oral argument before this Court, the undersigned agreed in the Supreme Court that the order of remand should be so drawn as to authorize the Commission to make a determination under Section 206(a) on the basis of the existing record, without the necessity of holding further hearings unless the Commission so desired. This agreement is shown in the following footnote 10 appearing in Sierra's brief in the Supreme Court at page 32:

> "PG&E and the Commission also both complain that it would be an undue burden on the parties as well as on the Commission to compel the Commission to begin all over again with a new proceeding and the taking of new testimony, under 206(a). With this contention we are in sympathy. In making our motion to amend the opinion in the Court below we had assumed that in a new proceeding initiated by the Commission under 206(a) the Commission could act on the existing record, with such additional evidence as any party might desire to add. If there is any doubt as to this, we would have no objection to the order being further amended so as to provide that the case should be remanded to the Commission 'with instructions to dismiss the proceeding under 205 without prejudice to the continuation of further proceedings under Section 206(a)' instead of expressly requiring the 'initiation of a new proceeding under Section 206(a)', as it does now. But there can be no doubt that unless the 1948 rate contract is regarded as a complete nullity, the Section 205 proceeding must be dismissed before any further steps can be taken under Section 206(a)."

But whatever the basis of the Supreme Court's action may be, I submit it is plain from the foregoing that the resolution of this controversy depends on the extent to which, if any, the Supreme Court intended to change the decision of the Court of Appeals on the merits—despite the fact that its judgment read, "the judgment of the * * * Court of Appeals * * * is hereby, affirmed * * *". Obviously this is a controversy which should be settled in the first instance by the Court of Appeals for the District of Columbia itself.

6. In support of my contention that the issues on this appeal relate to the construction and meaning of the opinion and mandate of the Court of Appeals for the District of Columbia Circuit as the same was modified in part for the foregoing reasons by the Supreme Court, I respectfully refer this Court to PG&E's original motion before the commission to reopen the proceedings, which is the motion allegedly erroneously denied by the order here sought to be reviewed and a true copy of which is annexed hereto as Exhibit B. As will more fully appear therein, PG&E there argued that the mandate required the Commission to reopen the proceedings and, among other things, to make a retroactive determination as to whether or not the contract rate was against the public interest on June 17, 1954. It is and, ever since the decision of the Supreme Court in the principal case, has been Sierra's contention that the mandate was only permissive and gave PG&E no right whatever to any further hearings, and further, that under the express decision of the Court the Commission had no right under that mandate to make any retroactive determination. Surely this is an issue that requires a construction of the mandate as read in the light of the opinion of the Court of Appeals as affirmed by the Supreme Court.

7. I stated on the oral argument in this Court that it was my belief on the basis of certain cases cited in the motion to dismiss submitted by the Commission (*L. J. Marquis & Co.* v. *SEC,* 134 F. 2d 335 (2nd Cir. 1943); *L. J. Marquis & Co.* v. *SEC,* 134 F. 2d 822 (3rd Cir. 1943); *Columbia Oil & Gasoline Corp.* v. *SEC,* 134 F. 2d 265 (3rd Cir. 1943); *American Power & Light Co.* v. *SEC,* 325 U. S. 385 (1945)), that if either this Court or the Court of Appeals for the District of Columbia Circuit should deem that equity required that PG&E be permitted to present its petition to review before the latter Court even though the time to file such petition had expired, this could be accomplished by a transfer of the petition filed in this Court to the District of Columbia Circuit. It is true that in the Commission's motion it states that it distinguishes these cases. I submit, however, that the cases show that under proper circumstances, where equity so requires, a petition filed in the wrong circuit inadvertently but without fault can be transferred to the proper circuit even though the time for such a filing may have expired. As stated on the oral argument, if such a transfer were made or requested, I would petition the Court of Appeals for the District of Columbia Circuit to reject the petition on the ground that it appeared on the face of the petition itself that the contentions raised by PG&E are frivolous and sham and that the matters sought to be reviewed are in fact not appealable and that therefore, PG&E is not entitled to any equitable relief. I cite the cases simply to counter any suggestion by PG&E that if the present motion is granted it will be *inequitably* deprived of its day in court. If equity requires, it can still be heard in the right Circuit.

As indicated on the oral argument, on October 1st, 1957, the undersigned sent to counsel for PG&E a copy of a letter which he addressed to the Clerk of this Court asserting that this Court was without jurisdiction to entertain a review of the Commission's order, and citing cases in support thereof. A true copy of that letter is annexed as Exhibit C hereto. If PG&E in good faith wished to attempt to bring the matter here and reserve its right later to bring it before the Court of Appeals for the District of Columbia Circuit, it could of course have filed its petition for review shortly after receipt of that letter, instead of waiting until the time to file such an appeal had practically expired.

....
William C. Chanler

Sworn to and subscribed before me on
the 21st day of December, 1957.

EXHIBIT A

UNITED STATES OF AMERICA

Before the

Federal Power Commission

Washington, D. C.

In the Matter of
PACIFIC GAS AND ELECTRIC COMPANY

Docket
No. E-6482

Reply Brief
of
Pacific Gas and Electric Company

ROBERT H. GERDES
RALPH W. DUVAL
FREDERICK T. SEARLS
245 Market Street
San Francisco 6, Calif.
Attorneys for Pacific Gas and Electric Company

WHEAT, MAY & SHANNON
ROBERT E. MAY
Shoreham Building
Washington, D. C.
Of Counsel

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UNITED STATES OF AMERICA

Before the

Federal Power Commission

Washington, D. C.

In the Matter of
PACIFIC GAS AND ELECTRIC COMPANY

Docket
No. E-6482

Reply Brief
of
Pacific Gas and Electric Company

INTRODUCTION

In this brief Pacific Gas and Electric Company, seeking authority to increase its rates for electric service to Sierra Pacific Power Company, replies to the brief of the latter company opposing the increase. As in the opening brief the parties will be referred to as Pacific and Sierra, respectively. Since the brief of the Commission's Staff concludes that Pacific has met the burden of proof, imposed upon it by the Federal Power Act and by this Commission's order, to show that the proposed rate is just, reasonable and not unduly discriminatory or preferential this reply will be directed entirely to Sierra's brief. However, to the extent that the Staff's brief seems to accept, without discussion, some of the contentions of Sierra, this reply is intended to apply to the Staff's brief as well.

STATEMENT OF THE ISSUES

Comparison of the three opening briefs on behalf of Pacific, the Commission's Staff and Sierra reveals agreement on a number of primary facts and principles of law.

It is not disputed that under the present schedule of charges Pacific will receive only a 2.6% return on its net investment in all facilities allocated to service to Sierra. It is stipulated that Pacific is entitled to a 5.5% return for its electric department (T. 675).* Thus Pacific's service to Sierra is producing revenue which yields less than one-half of what would be a fair rate of return. It is also undisputed that the increased charges proposed by Pacific will produce only 4.75% return, a rate of return still well below that stipulated to be reasonable.

The Staff's brief finds that the proposed rate is just and reasonable when measured by the cost of service including return at 5.5%, and concludes that there is nothing to justify departure from that standard as a measure of the reasonableness of the rate (Staff's Brief, p. 34).

To avoid any contention of discrimination against Sierra, Pacific has proposed a rate which will yield only 4.75%, the proposed tariff being equivalent to Pacific's Schedule F. P. C. No. 6 (Supplement No. 1) for service to The California Oregon Power Company and also equivalent to

---

* References thus are to pages of the transcript of the hearing on this matter.

Pacific's regular filed tariff for intrasate resale service. Neither Sierra nor the Commission Staff find the proposed rate to be unduly discriminatory or preferential (Staff's Brief, p. 31; Sierra's Brief is silent on this point).

Since the reasonable rate of return is 5.5%, to require Pacific to continue to serve Sierra for a return of only 2.6% would amount to confiscation of investment in excess of eight million dollars devoted to service to Sierra.[1]

In the face of this obviously confiscatory return Sierra argues that it is in the public interest to require that the present rate remain in effect, "at least as long as Pacific earns more than it would save if Sierra's business were lost or abandoned." This contention requires the assumption that Pacific deliberately entered into a contract in 1948 by which it committed itself to a transmission line investment of more than one million dollars, and agreed to make an additional transmission line investment of similar amount when Sierra's load should require, all on the basis that it would not be *entitled* to any return or depreciation on the investment over a period which may extend until 1979!

This assumption is directly contrary to common sense and to the testimony of both parties that the purpose of the 15-year term of the contract was to protect Pacific's (and Sierra's) investment in transmission lines to be constructed in accordance with the contract for the service to Sierra. Sierra's strained argument simply ignores this fact and fails completely to explain how a rate so long as to be confiscatory is consistent with protection of the investment.

---

[1] The California Public Utilities Commission, herein called California Commission, in fixing rates subject to its jurisdiction has not permitted Pacific to recover any revenue from other customers to offset the present low return from Sierra.

It is obvious that Pacific could not even recover the cost of borrowed capital to make this investment, let alone provide anything for equity money on such a rate of return.

Without this assumption of a commitment by Pacific to perpetuate the present rate Sierra's arguments have no foundation. This brief will show that there was no such commitment because (1) it is contrary to the terms of the contract both as expressed in the contract and as contemporaneously interpreted by the parties, (2) it is not to be implied from adoption of a schedule of charges equivalent to Pacific's 1945 Schedule P-31 for intrastate resale service, and (3) it is not to be implied as a consequence of the fact that Sierra made the contract with Pacific in preference to a contract for Bureau of Reclamation power which could not be delivered when needed.

The Staff's brief concludes that even if such a commitment were made it should have no bearing on the result since the principle involved is contrary to the public interest. With this we are in accord since a contract requiring such a large additional investment for public utility service which does not permit a recovery of a reasonable return on the investment would be clearly unreasonable.

If Pacific had made a contract on such an improvident basis the Federal Power Act would require this Commission to determine the reasonable and just contract to be in force hereafter (Sec. 206 (a)). However, the evidence demonstrates that Pacific did not make such an ill-advised contract but clearly contracted for protection of its investment and we need not pursue the point further here.

As we understand Sierra's position—and it takes considerable analysis to disentangle the structure of its argument from its so-called "Abstract of Evidence" and the subdivisions of its "Argument"—this Commission is not bound by a rule of law in this case but is to act on the basis of its determination of the requirements of the public interest. Sierra has virtually abandoned its procedural point, urged in a barrage of petitions and motions demanding a termination of this proceeding as a matter of law, and has conceded that all of the issues are now before this Commission for determination. We would add only that the measure of the public interest is found in the requirement of the Federal Power Act that all charges demanded or received by any public utility "shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful" (Sec. 205(a)).

We submit that a rate of return of 2.6% is not just or reasonable but is confiscatory, and that an increase to 4.75% is justified and reasonable under all the circumstances. We turn now to our reply to Sierra's attempt to argue the contrary.

I.

SIERRA AND PACIFIC AGREED ON A TERM CONTRACT SUBJECT TO CHANGE BY REGULATORY PROCESS FOR PROTECTION OF THEIR ADDITIONAL INVESTMENTS IN TRANSMISSION FACILITIES.

A. This Commission Has Jurisdiction to Change the Present Contract Rate.

Sierra concedes, as it must, that the present service contract is subject to such changes as this Commission may direct in the exercise of its jurisdiction (Sierra's Brief, p. 50). If, as Sierra indicates, this must be deemed an express provision of the service contract, then it is difficult to see how Sierra can contend that the parties contemplated an unchangeable rate. Indeed, we suppose that if Pacific's cost of service to Sierra had declined sufficiently Sierra would have demanded and been entitled to receive a reduction in the rate.

It is interesting to note that Sierra's brief nowhere states that Pacific *agreed* that the rate should remain unchanged for the entire contract term. Such a proposition too obviously flies in the face of the facts.[2] Yet, paradoxically, Sierra also contends by argument in its "Abstract of the Evidence" (pp. 30-31) and in its Point I (p. 48) that Pacific is committed to an unchanging rate. If all that Sierra means is that the present rate was intended to remain fixed until changed by the rate making process we do not quarrel with its position. Pacific has never contended that it had any arbitrary power, or, independently of regulatory process, any power at all to change its rate to Sierra. On the other hand, Pacific has always intended and understood that it may initiate a change in its rate to Sierra, just as in any other rate, through established regulatory procedure. That is exactly the course which it has followed here. The implied reservation to the Federal Power Commission of authority to modify the contract is the basis for Pacific's action.

Pacific does not claim to be able to place in effect any increase in its charges to Sierra unless it sustains its burden of establishing before this Commission that the increase is just and reasonable in a proceeding which gives full opportunity to Sierra to be heard and to oppose the increase if it chooses. In the light of fair analysis Sierra's attempt to argue by epithet that change by this process is "repudiation"[2a] or renders the contract "nugatory and valueless" becomes baseless accusation. Similarly, for Sierra to argue that its management cannot conduct its business on the basis of a contract subject to change by regulatory process is to deny the experience of every electric and gas utility dependent upon wholesale purchase for its supply of energy and gas.

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[2] See Pacific's Brief, pp. 21-25.

B. Pacific Did Not Give up Its Right to Invoke the Rate Making Process to Increase Its Rate to Sierra.

Sierra could not concede, however, that the service contract is subject to change in the normal course of regulation without undermining its case. If Pacific could invoke the normal regulatory process for a rate increase Sierra could not claim that Pacific had voluntarily assumed the burden of increasing costs. It therefore attempted to prove that Pacific gave up this right when it executed the service contract without an express provision that the rate was changeable by the normal rate making process (Sierra's Brief, p. 48). We would have thought that the express and implied reservations of authority to the California and Federal Commissions to change the contract (Sierra's Brief, p. 50) were adequate expressions of Pacific's intention but Sierra ignores them. Instead Sierra attempts to draw a conclusion from comparison with Pacific's Schedule F.P.C. No. 6 for service to The California Oregon Power Company. That schedule contains a formula provision for adjustment of the rate to correspond with changes in Pacific's regular filed resale tariff for intrastate service.[3] It should be evident that this formula, incorporated in a 1952 contract after Sierra had contested the right of Pacific to obtain a rate increase, was adopted to forestall the argument made here. It cannot aid in the interpretation of a contract made four years earlier when there was no such contest.

[2a] The term "double dealing repudiation" which counsel for Sierra has seized upon so enthusiastically was used by counsel for Pacific only with reference to a contract with the City of Redding made about four months before the filing of the rate increase application from which the contract was voluntarily excepted by Pacific. This contract was made after a public election in Redding in which the voters expressed their choice for a contract with Pacific in preference to a concrete proposal from the Bureau of Reclamation. See California Public Utilities Commission Decision No. 43147, issued July 26, 1949 (not printed).

It is even weaker for Sierra to argue (its Brief, "Abstract of the Evidence," p. 31) that the fact that a comparison was made by Sierra between Pacific's present rate and the Bureau of Reclamation's proposed rate for a 15-year period evidenced any intention or understanding that that rate could not be changed. This comparison was the only one that could be made between the two rates since future changes in the cost level could not be predicted. It would be absurd for Pacific to argue that the present rate could not be reduced by this Commission for 15 years simply because Sierra had made a 15-year comparison on the assumption of no change in rate level. It is equally absurd for Sierra to argue that for such a reason there can be no increase when fully warranted by increased costs.

Sierra attempts to bolster these arguments with references to testimony given in 1945 before the California Commission by Pacific's rate engineer. We will discuss them in a subsequent section of this brief since they relate to the adoption of the P-31 rate for intra-state resale service and form no part of the understanding between Sierra and Pacific as expressed in their 1948 contract.

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[3] We do not assume that this formula is binding on the Federal Power Commission. Most of the energy delivered under the California Oregon contract is resold by the purchaser within California.

C. The Contemporaneous Evidence Demonstrates That the Purpose of the 15-Year Term of the Contract Was to Protect Pacific's Investment.

We need not rest our case on the weakness of Sierra's arguments. The direct and positive evidence of the contract itself and the virtutally contemporaneous statements in the 1948 hearing before the California Commission prove that the purpose of the 15-year term was protection of the new investment.

Two prior contracts, each of which called for a new transmission line, had 15-year terms. Pacific's first proposal to Sierra in 1947 was for a new line and a new 15-year term. The 15 years was accepted without discussion throughout the negotiations and without relation to the rate.

It is significant that the contract relates the 15-year term to the completion of the new 110,000 volt line and requires a new 15-year term to begin when a second such line is completed and placed in operation to meet Sierra's requirements.

When to this internal evidence of the contract is added the statements of both parties made before the present controversy arose there can be no doubt that the term of the contract was intended to protect their respective investments. As to the reason for the 15-year term, Mr. Pollard testified for Pacific before the California Commission in 1948:

> "Well, of course, that was—on our part was in order to guarantee that we would have business for a long enough period of time *to warrant us in making the investment** in the cost of the new line and amortizing it. And, furthermore, followed the same pattern as

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* Emphasis ours, throughout the brief.

> previous contracts we have had in each of which instances a substantial investment was made for service of this customer. And, similarly, 15-year contracts were taken at each of those times for that reason." (Ex. 12, p. 12)

In the same proceeding Mr. Tracy testified for Sierra on the necessity for a 15-year contract.

> "When load conditions are such that you have to have additional capacity it might be that that additional capacity could be arranged to carry you over for a short period—be sufficient to carry you over for a short period, but in case where you have to go to a relatively large investment it is only fair and business —proper business that the Company you are negotiating with *gets a proper return on the investment for that period.* That is the basis upon which we would operate ourselves, we would not expect anybody to go to a large investment which is necessary in order to give the Company capacity they need for any shorter period than that." (Ex. 12, p. 26)

In the same proceeding the following occurred on cross-examination of Mr. Tracy:

> "Q. This contract effectively tie Sierra's hands for 15 years, will it not?
>
> A. In what way do you mean?
>
> Q. Well, because of the fact that you are prohibited from developing any further power facilities of your own?
>
> A. No, I do not think that is true. The contract is worded in that way, if the parties have a modification that is justified I think the parties can get together on it. In other words, only the—the principal thing that the selling party would have—I might be corrected on this if I am wrong from P. G. & E. Company—would be

> idle investment. In other words, if we had a development that we found feasible and it came in at a time when any investment was [not][4] made idle by the P. G. & E. in other words, at a times when they might have to put in additional investment even to serve it, it would not penalize P. G. & E. if we went ahead on it and we could make arrangements with them to do so." (Ex. 12, pp. 33, 34)

In other words Mr. Tracy believed that Pacific's primary concern was its investment and that a modification of the contract for Sierra's benefit would be justified under any circumstance where Pacific's investment was protected. If Mr. Tracy had exhibited the same reasonable attitude which he expected from Pacific in 1948 toward Pacific in 1952 when requested to renegotiate the present rate in accordance with the order of the California Commission[5] this proceeding would doubtless have been unnecessary.

In the present proceeding in 1953 Mr. Tracy testified that in his 1948 testimony before the California Commission he gave all the reasons which he could think of in support of the contract (T. 672). The transcript of that proceeding (Ex. 12), will be scanned in vain for any indication that Pacific intended to give up any right to initiate a rate increase or that Mr. Tracy ever had any such understanding. Are we to believe now that it was mere oversight that when the 15-year term was mentioned in 1948, Mr. Tracy thought only of a proper return for Pacific's investment rather than a guaranteed rate for Sierra, even though he was obviously looking for reasons to satisfy his Nevada opposition?

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[4] The context requires insertion of the "not" at this point.

[5] Exhibit 17, pp. 41, 46-47, and T. 987, 988.

Not quite two years later, before the California Commission in 1950, Mr. Moulton, Pacific's Vice President and Executive Engineer, explained the difference between the 15-year term of the Sierra contract and the 5-year term of other resale contracts as follows:

> "We finally made a 15-year contract with Sierra Pacific. *We made a longer contract because we under-[took]*[6] *to build an additional line* to supply them and *we felt we needed that protection of a long contract.*" (Ex. 15, p. 541)[7]

Even in 1952 after Sierra had determined to oppose any increase by Pacific, Mr. Tracy testified for Sierra before the California Commission on cross examination as follows:

> "Q. While the Commissioner has stated that the record in the contract proceedings contains the support for the contract or purportedly it did, you made the statement that you made this 15-year contract because you wanted to have assurance of power supply and that it was the best source of power at reasonable rates. Is it not a fact, Mr. Tracy, that Pacific Gas and Electric Company was insisting on a 15-year contract in order to protect it in a very large investment that it had to make in facilities in order to bring power to the summit to supply to the Sierra Power Company?

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[6] The text has "understood" at this point, clearly a reporter's error.

[7] This testimony also shows that Sierra is completely mistaken in interpreting Mr. Moulton's testimony as support for its position that the contract rate could not be changed. Mr. Moulton recognizes that the purpose of the 15 year term was to protect the new investment. This testimony was given within a few months after initiation of service over the new 110,000 volt line to Sierra, and the fact that an increase was not deemed warranted at that time does not constitute a bar to an increase under conditions of greatly increased cost.

> A. I think that works both ways. Yes, our company wished to have a firm contract too to cover our investment." (Ex. 23, pp. 1418, 1419)

Protection of investment is not accomplished by ignoring diminishing returns. Failure to allow a fair return on property devoted to public utility service is confiscation of that property. To argue that Pacific consented to possible loss of all return for up to 30 years on a new investment in excess of one million dollars is absurd and contrary to the express testimony.

We submit that the evidence establishes without contradiction that Pacific did not give up its right to a rate increase by means of normal regulatory procedure and that it is entitled to a rate of return which will protect its entire investment for service to Sierra.

II.

THE ADOPTION IN THE SIERRA CONTRACT OF CHARGES EQUIVALENT TO THOSE IN PACIFIC'S INTRA-STATE RESALE TARIFF P-31 DOES NOT SUPPORT SIERRA'S CONTENTION THAT PACIFIC COMMITTED ITSELF TO PERPETUATE THAT RATE FOR THE CONTRACT TERM.

When the present contract was being negotiated with Sierra in 1947 and 1948 Pacific had on file with the California Commission two tariffs of general application for intra-state resale electric service to customers who purchased all of their energy requirements from Pacific. One of these, Schedule P-31 (Ex. 20), offered a rate approximately 10% below the other (Schedule P-6, Ex. 8, p. 2) to resale customers who would enter into a five year contract for service. The contract with Sierra did not incorporate the P-31 rate as such. It simply provided a schedule of demand and energy charges equivalent to those in effect under the P-31 tariff, plus a stand-by charge, and incorporated certain of the conditions of that tariff.

A. The P-31 Rate Was Not a Fixed Rate But Was Actually Increased Twice by the California Commission.

Sierra would argue first that the P-31 rate was established as a fixed rate for the term of each five-year contract and therefore that the Sierra rate is a fixed rate for the 15 to 30 year term of its contract. We have already shown that the conclusion does not follow because the 15 year term was proposed for protection of the new investment long before the P-31 rate entered into the negotiations. The premise that the P-31 rate could not be changed is equally unsound.

The California Commission has twice increased the P-31 rate since its adoption in 1945. The first occasion was in 1950 in response to Pacific's application for a 6% rate increase. The second occasion was in 1952 when the California Commission superseded Schedule P-31 by Schedule R, which is equivalent to the rate proposed in this proceeding. In each of those cases the Commission excepted from the increase certain named customers but the balance were required to pay the increased rate beginning with the effective date of the general increase regardless of the fact that they were being served under term contracts.[9] This

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[9] As to the 1950 increase of 6%, Exhibit 18 shows that Pacific requested an increase in each of its filed schedules (p. 8) and was authorized to make such increase effective for service from April 15, 1950 subject only to the named exceptions (p. 16). Pacific estimated that it would receive additional revenue of $140,000 annually from resale customers as a result of this increase (p. 8).

As to the 1952 increase, Exhibit 17 shows that the California Commission authorized cancellation of all existing schedules and is convincing evidence that the California Commission does not regard the P-31 rate as immune from changes when required by increases in the cost level.

The testimony of Pacific's rate engineer in 1945, to the effect that users of the P-31 rate were assured of the lower rate for a five-year term (quoted by Sierra in its brief at pp. 31, 49), sounds impressive when isolated from its context. We believe, however, that a study of the record of that proceeding will show that Mr. Beckett meant "lower than the P-6 resale schedule" and that he did not have in mind a fixed rate regardless of cost considerations. In any event the California Commission has set the matter at rest by granting the increases above described.

B. Pacific Did Not Give Its Right to a Compensatory Return When It Offered the Equivalent of the P-31 Rate.

The adoption of the P-31 rate level is also used by Sierra as the ground for a contention that Pacific committed itself to a non-compensatory rate level. Sierra argues that because the P-31 rate was conceded in 1945 to be non-compensatory when applied to a class of resale customers which did not include Sierra, therefore Pacific committed itself to a non-compensatory return from Sierra by adopting the same rate level. It should be obvious, however, that the

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transfer of customers to the increased schedules applicable to the service rendered, including Schedule R for resale customers (pp. 46, 85) subject only to exception for certain listed contracts.

The exception of Sierra from the 1952 increase was expressly stated by the California Commission to be for the purpose of allowing an opportunity for the parties to renegotiate the contract "in the light of the new basic resale schedule," i.e. Schedule R (Ex. 17, p. 41). The refusal of Sierra to negotiate (T. 988) does not convert this exception into a final disposition of the matter by the California Commission. The matter is pending before that Commission in a new proceeding. See Exhibit 22, pp. 4 and 5.

statement as to the return from a given rate when applied to a certain class of customers is not necessarily true when the same rate is applied to another customer under different circumstances. In 1952 Pacific was able to earn a 2.6% return in its business to Sierra in spite of the sharp increase in costs subsequent to 1948. It should be evident that on the basis of 1948 costs Pacific must have anticipated a reasonable return.

There is no concession in the 1948 proceedings before the California Commission that the Sierra rate was expected to be non-compensatory. A California Commission staff member asked Pacific's witness whether, *if* the rate should prove non-compensatory, no burden would be placed on other customers. Pacific's witness agreed that under such circumstances other customers should not be burdened. We do not see how this can be taken as evidence one way or another as to how much return the Sierra rate was expected or intended to produce, nor as evidence that Pacific's stockholders did not expect to be fairly compensated from Sierra's business.

This Commission will realize, however, that while the new line remained lightly loaded it would hardly be likely to earn a full return. This, however, should not prevent realization of the full earning power of the line as utilization increases. The Staff's method of deriving cost of service and rate of return by averaging in with the system network the special lines devoted to service to Sierra eliminated from consideration the actual loading of these lines and the present 2.6% return thus computed does not reflect any particular stage in the growth of Sierra's load.

C. The Proposed Rate Meets Sierra's Test Since Pacific Will Not Receive More Revenue Under the Proposed Rate Than It Could Save by Abandoning Sierra's Business.

Throughout its argument Sierra is careful to qualify its contention as to maintenance of the present rate by conceding that Pacific is entitled to earn at least as much under the present rate as it would save if Sierra's business were lost or abandoned. We have already pointed out in our opening brief (pp. 29-32) that this reasoning is applicable only to a rate designed to retain existing business served by facilities which otherwise would be idle, and that it does not apply where a substantial additional investment is contemplated. However, even taking at its face value Sierra's test which compares revenues under the proposed rate with the costs which Pacific could save if it abandoned Sierra's business today the rate will qualify.

All of Pacific's investment in generation and transmission capital allocated to Sierra could be used almost immediately to serve other customers on Pacific's system, excepting only the three transmission lines from Drum to Summit. Pacific's load has been increasing at a rapid rate for many years and it is still engaged in expanding its generation and transmission capacity to meet the growing demands on its system. The increase in Pacific's sales of energy during 1952, as shown on page 69 of Pacific's Form 1 report to this Commission for that year, was 3.75 times the entire amount of Sierra's load for the year. Loss of Sierra's business then would simply mean freeing capacity for use elsewhere on the system.

The rate base allocated to Sierra by the Staff method (Ex. 19) consists almost entirely of generation, transmission and common utility plant and includes only 1.4% of the $1,861,765 invested in the three transmission lines used to serve Sierra. This results from the fact that the investment in these lines is treated as part of the system network, 1.4% of which is allocated to Sierra.

It follows that the cost of service derived by the Staff's method does not include more than a negligible amount for depreciation or return and related income tax on the investment in the three transmission lines. To put the matter in another way, if Pacific should lose Sierra's business today, substantially all of the $8,489,633 of capital investment allocated to Sierra would shortly be used to serve other system load and would be expected to earn a fair and reasonable return.

The same result will be reached if Sierra's erroneously conceived test is applied to Pacific's derivation of a rate of return (Ex. 4). In Pacific's computation the investment in the three lines is allocated directly to service to Sierra and all of it appears in the rate base. The revenue under the proposed rate falls short of full costs of service by $725,000 per year, a deficiency far in excess of any conceivable depreciation, return and related income tax allocable to the three lines. See Pacific's Brief, pp. 6, 7 and Appendix.

The conclusion of counsel for Sierra that the fact that Pacific earns some return shows that it is earning more than it could save if it lost the business is a superficial conclusion not supported by an analysis of the rate base on which the return is earned. On the contrary, it must be concluded that from the standpoint of Sierra and its customers, the proposed rate is as low as could reasonably be permitted by any method of cost calculation and by any test which has been suggested.

III.

THE EXISTENCE OF PUBLIC PRESSURE UPON SIERRA TO CONTRACT FOR BUREAU OF RECLAMATION POWER WHICH COULD NOT BE DELIVERED WHEN NEEDED DOES NOT JUSTIFY THE CONTENTION FOR A RATE FIXED REGARDLESS OF COST.

A review of the record in this case and the three opening briefs will show that "competition" is a word of many meanings. Counsel for Sierra profess amazement that we should deny the existence of competition with the Bureau of Reclamation, whereas we fail to see how they can label a situation competitive when the consumer has only one feasible source for the supply of its needs. Despite this diversity of opinion as to what constitutes competition there is substantial agreement as to the facts of the situation and we propose to talk about those facts.

The first fact is that Sierra needed a substantial amount of additional power to meet its load requirements in 1949 and 1950.

The second fact is that the Bureau did not even hope to obtain appropriations from Congress and complete a single circuit line to serve Sierra before 1951 and probably not until 1952. The Bureau of Reclamation thus had no way of supplying Sierra's 1949 and 1950 requirements for additional power.

The third fact is that Bureau power as a source of supply for Sierra would have had many disadvantages even after service was initiated. Chief among these were (1) reliance on 125 miles of single circuit line, (2) reliance on a single hydroelectric project which could be affected by adverse water conditions, (3) requirements for standby service at "prohibitive" additional cost (Ex. 12, pp. 28, 31), and (4) the Bureau requirement that Sierra "wheel" power to municipalities and public agencies entitled to "preference" under reclamation law (Ex. 21, p. 17, par. ii).

The fourth fact is that in 1947 and 1948 there was considerable agitation in Northern and Central Nevada to get "cheap" government power. Public sentiment was aroused and Sierra was under pressure to make some sort of arrangement for obtaining power from the Bureau of Reclamation.

These facts are not disputed and whether counsel for Sierra labels the Bureau as a "competitive" source of power is really immaterial. The label adds nothing, but when counsel try to argue that Sierra lost a bargaining position when it entered into the contract with Pacific they have to insist on the label and ignore Sierra's actual situation. Realizing, however, that the facts are inescapable, they try to make it appear that Sierra had a choice between two feasible sources of supply. To do this they have resorted to invention.

That awkward gap between 1948 and 1951 in Sierra's power resources, if it chose to contract for Bureau Power, is "tided over" (Sierra's Brief, pp. 39 and 66) by counsel's construction of the Walker River development. Since both Sierra's President and its engineer are agreed that construction of that project would have taken a minimum of three years (Ex. 12, p. 34; T. 745), Sierra would still have been short of power in 1949 and 1950, even if it decided to construct the Walker River project in the face of high costs.

The statement of the 1953 Nevada Public Service Commission (Ex. 22, p. 2) containing its views as to the position of the 1948 Commission,[10] suffers from the same infirmity as the argument of Sierra's counsel. That Commission now states that if it had, in 1948, doubted the "validity" of Sierra's contract it would have ordered Sierra to construct hydroelectric plants on three rivers and a supplementary steam plant. Thus Sierra would have had to invest unknown millions of dollars in high cost hydro plants and a steam plant to be operated at low load factor with high fuel costs,[11] none of which could have been constructed in time to meet its 1949 and 1950 requirements. While we doubt the authority of the Nevada Commission to issue such an order we doubt even more that in 1948, faced with the practical requirements of the situation, it would have seriously entertained such an idea.

Disregarding the time required for construction of new plants and disregarding their high cost of construction and operation, counsel for Sierra reach new heights of economic absurdity when they contend that these additional plants would have been developed "to tide over the expected shortages until the Bureau's lines were adequate to meet all possible needs." Neither of Sierra's witnesses testified that capital investment in any of these plants could be justified on a

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[10] Neither of the two members of the Nevada Commission who appeared in the 1948 hearings before the California Commission is now a member of the three-man Nevada Commission, according to the letterhead in Exhibit 22.

[11] It will be recalled that Mr. Tracy's opinion that he could produce steam generated power for 7 to 8 mills was based on the assumption (1) that he generated *all* his power requirements in the steam plant and (2) that fuel was at the 1946 Reno price of $2.05 per barrel. It will also be recalled that Mr. Tracy was very much opposed to Pacific's original proposal of a fuel escalator clause. If Sierra operated a steam plant of its own its costs would escalate immediately with each rise in fuel oil prices.

"tiding over" basis, nor did they give any explanation at all as to how the shortage in 1949 and 1950 could have been met.

The fact of the matter is that although counsel for Sierra is correct in stating (Sierra's brief, p. 19) that in October 1947 Sierra had before it a proposal from Pacific and a "plan" of the Bureau of Reclamation and the Colorado River Commission, the latter "plan" fell so far short of meeting Sierra's needs that Sierra never did make a serious endeavor to find out whether, or at what cost, the deficiencies in the Bureau's plan could be made up.

Nor did Sierra ever act like a buyer playing one competitor against another. Mr. Tracy explained to Pacific's General Manager in October of 1947 that his Company was not prepared to continue negotiations, that there was local political pressure to bring Shasta power into Nevada which *hampered Sierra's* negotiation and that Sierra could not afford to offend Shasta power advocates (Ex. 27, p. 4, statement of Pacific's General Manager October 8, 1947 at meeting of President's Advisory Committee). It is evident that Pacific was not given the impression that Sierra found anything desirable in the proposal for Bureau power. Instead Mr. Tracy was making it clear that he was faced with public pressure urging "cheap" government power and ignoring the practical requirements of the situation. The following testimony given by Mr. Tracy during cross examination by Mr. Wahrenbrock in this proceeding illustrates this point:

> "Q. Mr. Tracy, when Pacific Gas and Electric gave up the fuel escalator clause and submitted the proposed form of contract to you after the agreement on the demand and energy charge, what was your opinion as to why they were willing to give up that clause, which would have tended to protect them against at least one of the larger elements of risk in so long a term contract?

> [Objection by Mr. Searls on ground of irrelevancy overruled]
>
> * * * * * * *
>
> A. They did not inform me as to the reason and I certainly would not take it upon myself to guess.
>
> By Mr. Wahrenbrock.
>
> Q. Did you think you had outsmarted them on that?
>
> A. No. That isn't the correct answer. We thought that we had showed them sufficient reasons for proposing to us a lower rate.
>
> Q. Namely the threat of taking your load someplace else.
>
> A. The potential competition that was *very prevalent. The papers were full of it.* As I testified before, all the groups were active. The Chamber of Commerce had a power committee." (T. pp. 937, 938)

Notice that Mr. Tracy declined to state that he threatened to take his load elsewhere. To him the word "competition" seems to be synonymous with "public pressure" since he stated in his testimony that even after the contract with Pacific was signed and approved by the California Commission, he was bothered by "competition" (T. 939).

In the face of all this evidence, which boils down to the fact that Sierra could not get the power it needed except from Pacific and the fact that any alternative was bound in the long run to mean high but uncertain costs when all factors were taken into account, Sierra's argument that it gave up a bargaining position or that either it or its customers have lost anything by making a contract with Pacific for service at a rate subject to regulatory change is without foundation.

"The papers were full" of competition and it was "very prevalent," but this sort of competition was more of a problem to Sierra than to Pacific. Sierra had no illusions about the desirability of a contract for Bureau power as is demonstrated by Exhibits 30, 32, and 34, consisting of intra-company communications which list Mr. Devore's or Mr. Tracy's objections to such an arrangement.

Sierra was not making fine calculations to determine the cost of various alternatives nor was it trying to extract from Pacific an agreement for an unchangeable rate. The 15-year term was important from the investment standpoint but was actually considered objectionable by some public power proponents who did not like Sierra to be tied up for such a period at any price. Sierra endeavored to and did obtain the lowest available rate from Pacific but this was a standard rate, available to qualified resale customers whether or not they had competitive sources of supply.

Pacific undoubtedly felt the effect of the public pressure and reexamined its position that the P-31 rate level was not adequate (Ex. 27, p. 4). When it concluded that it could offer this rate it did not expect that it would be fixed in the face of cost changes. The argument to the contrary seems to be only that because Pacific came down in its price it must be implied that it also gave up its right to the use of the rate-making process. There is no basis for such a conclusion.

When called upon at the California hearing in 1948 to justify making the contract with Pacific, Mr. Tracy attempted to educate the public representatives from Nevada to the facts of the situation which Sierra then faced. He showed that he really had no choice in the matter. He did not claim that the 15-year term was agreed upon to secure a favorable rate; he explained that it was a necessary protection for the new investments to be made. The public representatives were satisfied with this and withdrew their opposition (T. 672).

In a few words, neither Sierra nor public opinion were demanding a fixed rate, nothing in the situation required a fixed rate and nothing in the negotiations, the contract, or the explanations of the contract in the 1948 proceeding ever suggested that a fixed rate had been discussed, much less agreed upon.

CONCLUSION

The issue in this case is whether Pacific's proposed rate increase is just and reasonable under the Federal Power Act. The present rate yields a return so low that its continuance would be confiscatory. Pacific's proposed rate will yield a return of only 4.75%, which is clearly reasonable when compared with the stipulated reasonable rate of return of 5.5%.

Sierra has shown no valid reason why it should be exempted from the increase in costs of generation and transmission of power nor why this Commission should disregard Pacific's need for additional revenue to cover costs of service and maintain its financial integrity.

It is respectfully submitted that Pacific has shown that the present rate is unjust, unreasonable and unduly preferential and that the proposed rate is just, reasonable and not unduly discriminatory. The requested increase should be authorized.

ROBERT H. GERDES
RALPH W. DUVAL
FREDERICK T. SEARLS
Attorneys for Pacific Gas and Electric Company

WHEAT, MAY & SHANNON
ROBERT E. MAY
Of Counsel

REQUESTED FINDINGS

1. Electric power generated and transmitted by Pacific Gas and Electric Company entirely within California is sold at wholesale and delivered to Sierra Pacific Power Company at Summit in California near Donner Pass under Pacific Gas and Electric Company's rate Schedule F.P.C. No. 3, effective as of January 1, 1948.

2. Sierra Pacific Power Company transmits some of the electric power received from Pacific Gas and Electric Company for sale to customers in California and transmits the balance to its customers in Nevada. By far the larger part of the energy received, approximately 86% in 1951, is thus transmitted to Nevada.

3. The sales of power by Pacific Gas and Electric Company to Sierra Pacific Power Company at Summit are sales at wholesale in interstate commerce subject to the provisions of Sections 205 and 206(a) of the Federal Power Act.

4. Pacific Gas and Electric Company's present rate Schedule F.P.C. No. 3 provides revenue which, after proper allowance for all operating expense allocable to service to Sierra Pacific Power Company, yields a rate of return on the net investment rate base properly allocable to such service which is so low that said rate is unjust and unreasonable and constitutes an undue preference to Sierra Pacific Power Company.

5. Pacific Gas and Electric Company's proposed rate increase contained in its proposed Supplement No. 1 to Schedule F.P.C. No. 3 will provide revenue which is less than is necessary to yield a reasonable return on the net investment rate base properly allocable to the service to

Sierra Pacific Power Company, after due allowance for all operating expense allocable thereto.

6. No other facts have been shown affecting the justness and reasonableness of said proposed rate.

7. The proposed rate is just and reasonable.

8. The proposed rate is not unduly discriminatory or preferential.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing answer upon all parties of record in this proceeding by mailing a copy thereof properly addressed to:

Howard E. Wahrenbrock, Esq.,
Assistant General Counsel

Drexel D. Journey, Esq.,
Attorney
Federal Power Commission
441 G Street N.W.
Washington 25, D.C.

Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York 5, N. Y.

Frederick T. Searls
Attorney for Pacific Gas and Electric Company

EXHIBIT B

Before the

FEDERAL POWER COMMISSION

In the Matter of Pacific Gas and Electric Company	**Docket No. E-6482**

Motion of Pacific Gas and Electric Company for Reopening and Further Hearing

Pacific Gas and Electric Company, hereinafter called PG&E, moves for reopening of this proceeding in accordance with the following:

1. On February 2, 1953, PG&E filed with the Commission its proposed rate schedule Supplement No. 1 to Schedule F.P.C. No. 3 for service to Sierra Pacific Power Company, hereinafter called Sierra. The charges specified in said Supplement No. 1 were higher than the charges provided in said rate schedule F.P.C. No. 3, which latter schedule was in the form of a contract between PG&E and Sierra.

2. The proposed effective date of said Supplement No. 1 was April 6, 1953. By order adopted March 13, 1953, the Commission suspended the proposed rates of Supplement No. 1 until September 6, 1953, and provided that said supplemental rate schedule should go into effect thereafter in

the manner prescribed by the Commission in accordance with the Federal Power Act. By the same order the Commission ordered a hearing concerning the lawfulness of the proposed rate.

3. By order adopted September 25, 1953 and issued September 28, 1953, the Commission declared that the proposed rates of said Supplement No. 1 had become effective as of September 6, 1953, subject to certain provisions of Section 205(e) of the Federal Power Act and made certain orders with respect to accounting and to refund in the event that any portion of the increased rates should be found not to be justified.

4. After hearings held in accordance with said order of March 13, 1953, the Commission, by Opinion No. 270 herein adopted June 16, 1954 and issued June 17, 1954, found that the proposed rate of said Supplement No. 1 was just, reasonable and lawful and, that "if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful;" and in effect by order authorized PG&E to charge and collect from Sierra said proposed increase under Supplement No. 1 to Schedule F.P.C. No. 3.

5. On Sierra's petition to review the Commission's order in said Opinion No. 270, the United States Court of Appeals for the District of Columbia Circuit, on May 23, 1955, set aside the Commission's said order and remanded the case to the Commission with instructions to dismiss the proceeding without prejudice to the initiation of a new proceeding under Section 206(a) of the Federal Power Act.

6. On February 27, 1956, the Supreme Court of the United States on writs of certiorari to said Court of Appeals affirmed the decision setting aside the Commission's said order, but instructed that the case be remanded to the Commission for such further proceedings not inconsistent with the opinion of the Supreme Court as the Commission may deem desirable.

7. On March 30, 1956, PG&E sent its check to Sierra refunding the amount of $382,022.37, which included $336,821.53, the amount of the increase collected from September 6, 1953, the day it was placed in effect, to June 16, 1954, the date on which said Opinion No. 270 and the order therein contained were adopted by the Commission, plus $45,200.84 representing interest thereon at 6% to the day of payment.

8. By motion filed April 16, 1956, Sierra requested the Supreme Court of the United States (1) to amend its instructions upon remand to limit further proceedings before the Commission to the determination of the lawfulness of the contract rate "at the time of such further proceedings" and the fixing of the rate "thereafter to be observed and in force," and (2) to declare that any amounts paid by Sierra in excess of the contract rates were unlawfully collected and that PG&E was obligated to make restitution of the excess payments. On May 28, 1956, the Supreme Court denied said motion without prejudice to the future determination of such rights as Sierra might have to restitution.

9. The opinion of the Supreme Court rendered February 27, 1956, which set aside the Commission's said order in Opinion No. 270, declared in effect that said order would be valid if supported by a finding that the contract rate ad-

versely affected the public interest by being so low that it might (1) impair the financial ability of the public utility to continue its service; (2) cast upon other customers an excess burden; or (3) be unduly discriminatory. Said opinion further declares that whether under the facts of this case the contract rate is so low as to have an adverse effect upon the public interest is a question to be determined in the first instance by the Commission, and that if the proceedings satisfied in substance the requirements of Section 206(a) it would be immaterial that the investigation was not begun under that section.

10. On June 1, 1956, the Supreme Court remanded this case with instructions for such further proceedings consistent with its opinion as the Commission deems desirable. By amplifying and supplementing its findings in accordance with said opinion of the Supreme Court, the Commission will protect the public interest, supply omissions arising from an erroneous view of the law, and make the determinations necessary to establish the right of Pacific to collect and retain the rate of said Supplement No. 1 from and after June 17, 1954.

11. The Commission is, therefore, requested to reopen this proceeding in order to make findings as to whether the rate of said Schedule F.P.C. No. 3 was on and prior to June 17, 1954, and thereafter, so low as to have an adverse effect upon the public interest and whether the rate of said Supplement No. 1 was not in excess of a just and reasonable rate for the service rendered on and after June 17, 1954.

12. Although the record now contains evidence sufficient to support a finding by the Comission that said rate Schedule F.P.C. No. 3 was so low as to have an adverse

effect upon the public interest, PG&E desires to present further evidence in support thereof showing that said rate was, prior to June 17, 1954, and ever since has been (1) so low as to impair the financial ability of PG&E to continue its service to Sierra; (2) so low as to cast upon other consumers an excessive burden; and (3) so low as to be unduly discriminatory. PG&E further desires to present evidence showing that the rate of said Supplement No. 1 was not in excess of a just and reasonable rate for the service rendered on and after June 17, 1954.

WHEREFORE, PG&E prays that this Commission reopen this proceeding to receive evidence, hear argument, and make findings material to the issues herein above set forth as raised by the said opinion of the Supreme Court of the United States and that a date be set for hearing thereon.

Dated this 8th day of June, 1956.

Respectfully submitted,

F. T. SEARLS
JOHN C. MORRISSEY
ROBERT E. MAY
Attorneys for
Pacific Gas and Electric Company

EXHIBIT C

October 1, 1957

Re: Pacific Gas and Electric Company
v. Federal Power Commission (Sierra
Pacific Power Company *v.* Pacific Gas
and Electric Company)

Paul P. O'Brien, Esq., Clerk
United States Court of Appeals
for the Ninth Circuit
Post Office Building
San Francisco 3, California

Dear Sir:

You will recall that on September 4, 1957, Mr. Malcolm T. Dungan of Brobeck, Phleger & Harrison wrote to you in connection with possible petitions for review and applications for stay by Pacific Gas and Electric Company regarding proceedings before the Federal Power Commission entitled and numbered *In Re Pacific Gas and Electric Company,* Docket No. E-6482, and *In Re Sierra Pacific Power Company,* Docket No. E-6697.

On Monday, September 23, 1957 in the course of the oral argument of certain motions in a separate action brought by Sierra Pacific Power Company against Pacific Gas and Electric Company in the United States District Court for the Northern District of California, Southern Division

(Civil No. 35591), counsel for Pacific Gas and Electric Company stated that his client intends to file in your Court a petition, under Section 313(b) of the Federal Power Act, for review of the Federal Power Commission's final order in proceedings above referred to. The last day on which such a petition could be filed is November 5, 1957.

As will necessarily appear on the face of any such petition for review that may be filed, the order to be reviewed was entered in response to a mandate issued by the United States Court of Appeals for the District of Columbia Circuit, in compliance with the decision of the Supreme Court of the United States in *Federal Power Commission* v. *Sierra Pacific Power Co.,* 350 U. S. 348 (1956), affirming *Sierra Pacific Power Co.* v. *Federal Power Commission,* 223 F 2d 605 (D.C. Cir. 1955). The law seems well established that a petition to review such an order can only be filed in the court which issued the mandate. That court having taken jurisdiction of the controversy, no other Circuit Court would have jurisdiction to entertain the petition, despite the provisions of Section 313(b) of the Federal Power Act. *Morris* v. *Securities and Exchange Commission,* 116 F 2d 896 (2d Cir. 1941); cf. *Hicks* v. *National Labor Relations Board,* 100 F 2d 804 (4th Cir. 1939).

I am not clear whether this is the type of jurisdictional defect which, as it would appear on the face of the petition itself, would move your Court to dismiss the appeal *sua sponte,* or whether Sierra should make a motion to intervene and dismiss the appeal. In any event I would appreciate it very much if you would notify Messrs. Brobeck, Phleger & Harrison immediately if any attempt is made to file such a petition in your Court. I am sending a copy of this letter to Mr. Searls, counsel for Pacific Gas and Electric Company, and to Mr. Wahrenbrock, Solicitor for the Federal Power Commission for their information.

Respectfully,

WILLIAM C. CHANLER
Of Counsel for
Sierra Pacific Power Company

cc. F. T. SEARLS, Esq.
HOWARD E. WAHRENBROCK, Esq.

GREGORY A. HARRISON, Esq.
BROBECK, PHLEGER & HARRISON

CHAMBERS OF JUDGE BAZELON

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15773

No 14422

PACIFIC GAS & ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

SIERRA PACIFIC POWER COMPANY,
Intervener.

INTERVENER'S CLOSING MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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STATES COURT OF [illegible]

Winthrop, Stimson, Putnam & Roberts,
40 Wall Street,
New York 5, N. Y.

Brobeck, Phleger & Harrison,
111 Sutter Street,
San Francisco 4, California,
Attorneys for Intervener.

William C. Chanler,
Of Counsel.

FILED
JAN 27 1958
PAUL P. O'BRIEN, CLERK

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 15773

Pacific Gas & Electric Company,
Petitioner,
v.
Federal Power Commission,
Respondent,
Sierra Pacific Power Company,
Intervener.

INTERVENER'S CLOSING MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

(1) Petitioner's answering memorandum does not cite a single case in which a petition to review an administrative order issued in response to a mandate was entertained by a court of appeals other than that which had jurisdiction of the original order. Its only attempt to distinguish the *Morris* and *Hicks* cases, which condemn such a procedure, is to argue that in those cases the appeal involved the construction of a remand issued by the Court of Appeals, whereas the issues on this appeal depend upon a construction of the mandate of the Supreme Court. In support of this alleged distinction, petitioner cites three cases:

Ex parte First Nat'l Bank of Chicago, 207 U. S. 61, 66 (1907);

SEC v. *Chenery Corp.,* 332 U. S. 194, 196, 200 (1947);

Chenery Corp. v. *SEC,* 154 F. 2d 6, 8 (D.C. Cir. 1946).

It is to be noted at the outset that in each of these cases the appeal from the second administrative order was taken to the same circuit which had passed upon the original order. Thus they lend no support to the proposition that the review of a continuing controversy before an administrative tribunal can be moved from circuit to circuit whenever a new order is issued pursuant to remand.

Moreover, an examination of those cases will disclose that, in attempting to support its purported "distinction", petitioner has jumped from the frying pan into the fire. For in the *First Nat'l Bank* case, *supra,* the Supreme Court held that *no* court of appeals had jurisdiction to review the decision of a lower tribunal construing a mandate issued by the Supreme Court, and that in such a situation the only recourse of the party aggrieved was to seek relief from the Supreme Court itself. And that is still the law: *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.,* 142 F. 2d 549 (7th Cir. 1944), and *Ohio Oil Co.* v. *Thompson,* 120 F. 2d 831 (8th Cir.), *cert. denied,* 314 U. S. 658 (1941).

It is apparent that, under petitioner's contentions as to the issues on this appeal, these cases are squarely applicable to the case at bar. Thus in its petition to review (p. 10) petitioner asserts that the Commission erred when it stated that it believed it was foreclosed from considering the contract issue by the decision of the Supreme Court. In its answering memorandum at page 7, petitioner asserts that in its argument on the merits it will show that the Supreme Court "left open" the issue as to the "true meaning of the 1948 rate contract'' and left it ''to be resolved, if required, by the trier of fact below''. And again, ''The issues raised by our petition concern the correct posture of the case in the light of that opinion and the proper application of the principles there enunciated by the Supreme Court'' (Memo, p. 12). In other words, petitioner intends to ask this Court to reverse the Commission's construction of the Supreme Court's opinion and mandate. That this Court cannot do. As was said in the *Mercoid* case, *supra,* 142 F. 2d 549 at 550-551:

> ''We think this is only to say that the only question here is whether the judgment of the District Court which includes these items is within the scope of the mandate of the Supreme Court, or exceeds the limits of that mandate. That is not for this court to determine, but must be left to the Supreme Court under the principles set forth above.''

Actually, as the Supreme Court merely affirmed the decision of the Court of Appeals that the rate contract was binding on petitioner without the slightest intimation that any issue as to its meaning was ''left open'', we would assume that the Court of Appeals for the District of Columbia Circuit would have jurisdiction to entertain a petition to review the Commission's action. But it is not necessary at this time to determine which of those two courts has jurisdiction: If petitioner is correct and the decision of this issue requires a construction of the opinion and mandate of the Supreme Court, then under the cases above cited, no court of appeals has jurisdiction of the present petition to review. If on the other hand an appeal does lie to a court of appeals, then clearly the *Morris* and *Hicks* cases are controlling, and the Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction. It follows that whether or not respondent's purported ''distinction'' of the *Morris* and *Hicks* cases has any validity, this Court has no jurisdiction to entertain the present petition to review.

(2) Petitioner's assertion that the issues sought to be raised on this appeal will come before this Court in any event on an appeal in the action for restitution commenced by intervener in the District Court for the Northern District of California, Southern Division, is readily answered: As appears from the opinion of the District Court annexed to petitioner's memorandum, all proceedings in that action have been stayed until the issues raised on the present appeal have been finally determined.

(3) Petitioner's sole attempt to support its broadside charges that our statement of the background of the litigation contains "erroneous, distorting and misleading statements"* is to assert that our statement that the California Commission refused to permit PG&E to increase its contract rate with Sierra in 1952, is "far from the whole truth". According to petitioner, the California Commission merely "acceded to a request by Sierra that it be allowed to negotiate a new rate. (See *Re Pacific Gas & Electric Company,* 52 Op. and Or. P.U.C. of Calif. 111, 150-151, 96 P.U.R. (N.S.) 493, at pp. 524-525, 526 (October 15, 1952).) Having had its request granted, however, Sierra then refused to negotiate" (Memo. p. 6).

Sierra's position before the California Commission, as set forth in the very Commission order cited by petitioner, was as follows:

> "* * * The protestant, Sierra Pacific Power Company, makes the point that if conditions are shown to justify a change in the rate, *which conditions it denies have been shown,* then the contract rates might be altered *but that such alteration*

---

* Other than to attack an alleged erroneous reference to a Commission docket number, and our reliance on the statements of fact in the opinions of the Court of Appeals and Supreme Court.

> *should be made by agreement of the parties* and submitted as previous contracts have been for approval by this Commission." (*Re Pacific Gas & Electric Co.,* 96 P.U.R. (N.S.) 493, 525 (October 15, 1952)) (Italics added)

We submit that petitioner's version of "the whole truth" is "made of whole cloth."

Conclusion

Petitioner has been as unsuccessful in supporting its challenge to the accuracy of our statement of the background of this litigation as it has in supporting its contention that this Court has jurisdiction of its petition to review. Having deliberately chosen, with full knowledge of the *Hicks* and *Morris* cases, to wait until the last moment before filing its petition to review in this Court, we submit that it is entitled to no consideration. Indeed, we think it is obvious that it has chosen to follow these tactics solely for the purpose of delay and harassment. Surely if petitioner had any faith in the merits of its appeal it would have avoided its present dilemma by filing its petition in the District of Columbia Circuit.

Respectfully submitted,

William C. Chanler,
Winthrop, Stimson, Putnam & Roberts,

Gregory A. Harrison,
Brobeck, Phleger & Harrison,

William C. Chanler,
Attorneys for Intervener,
Sierra Pacific Power Company.

CHAMBERS OF JUDGE BAZELON

No. 15773

In the

United States Court of Appeals

For the Ninth Circuit

No 14422

Pacific Gas and Electric Company,
Petitioner,
vs.
Federal Power Commission,
Respondent.
Sierra Pacific Power Company,
Intervener.

Memorandum in Answer to Intervener's Reply Memorandum on Motion to Dismiss

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F. T. Searls
Frederick W. Mielke, Jr.
Malcolm A. MacKillop
245 Market Street
San Francisco 6, California
Attorneys for Defendant

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No. 15773

In the

United States Court of Appeals

For the Ninth Circuit

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,
vs.
FEDERAL POWER COMMISSION,
Respondent.
SIERRA PACIFIC POWER COMPANY,
Intervener.

Memorandum in Answer to Intervener's Reply Memorandum on Motion to Dismiss

---

Sierra's reply is in two parts, a "memorandum" and a so-called "affidavit." We shall answer each separately.

I.

ANSWER TO "MEMORANDUM"

Pacific, being "aggrieved" by an order of the Federal Power Commission, is petitioning this Court of Appeals for a review of the order. Because it is located in California, Pacific has a statutory right to bring its petition in the Ninth Circuit (Federal Power Act, § 313, 49 Stat. 860, 16 U.S.C. § 825*l*). Sierra, in its motion to dismiss, has argued that two cases, *Morris v. S.E.C.,* 116 F.2d 896 (2d Cir. 1941), and *Hicks v. N.L.R.B.,* 100 F.2d 804 (4th Cir. 1939), prevent exercise of this statutory right.

In our memorandum in opposition to Sierra's motion, we pointed out that the *Morris* and *Hicks* cases have no relevance whatever. *Morris* is simply an application of the general principle that a court which issues a mandate is the one best able to construe it. *Hicks* is merely an application of the rule that multiple appeals from the *same* administrative order must be heard by only one Court of Appeals. For quite obvious reasons, neither of these doctrines is applicable here. (See our memorandum in opposition, pp. 4-12.)

Despite the obvious inapplicability of the *Morris* and *Hicks* cases, Sierra continues to urge them. With reference to *Hicks,* however, it seems apparent that even Sierra no longer seriously relies upon the case. Perhaps because of the stand of the Federal Power Commission in refusing to accept Sierra's argument on *Hicks,** we find Sierra making but brief mention of the *Hicks* case (Reply, pp. 3-4) and placing reliance almost exclusively on the *Morris* decision.

But even as to *Morris,* Sierra quite evidently realizes the weakness of its position. Confronted with the plain fact that only the opinion of the Supreme Court need be construed in this case, Sierra sets out to argue that somehow the earlier opinion of the Court of Appeals must also be construed and that this brings the case within the bounds of the *Morris* decision. The foundation for such an argument, however, simply does not exist. The controlling opinion is the one rendered by the Supreme Court. While it may be interesting to observe that there are substantial differences between the earlier opinion of the Court of Appeals and the final and controlling one rendered by the Supreme Court, it is of no significance here what these differences are, or how widely divergent the views of the Court of Appeals and the Supreme Court actually were. Although Sierra constantly suggests that some such comparison of the two opinions must be made (see especially statements at pp. 3, 4, and 5 of "memorandum" and pp. 2 and 11 of "affidavit"), there is no need whatever to do so. The law of this case is found only in the Supreme Court's opinion, and it is only this opinion which need be construed.

---

*The late-coming motion of the Commission incorporating Sierra's motion by reference notably avoids any suggestion that *Hicks* is applicable. (See F.P.C. motion joining intervener's request for dismissal, p. 2.)

> *Ex parte First Nat'l Bank of Chicago,* 207 U.S. 61, 66 (1907). ("The mandate of this court was addressed to [the Circuit Court of Appeals] alone, it is true, in point of form. * * * But the directions as to the further proceedings of the District Court were not an order to the Circuit Court of Appeals to issue an order to the District Court. They were directions which the Circuit Court of Appeals *was simply to communicate* to the District Court and which the District Court was to follow *on the authority of this court,* not of the Circuit Court of Appeals.")*
>
> *S.E.C. v. Chenery Corp.,* 332 U.S. 194, 196, 200 (1947) ("The issue now is whether the Commission's action is proper in the light of the principles established *in our prior decision.* * * * When the case was directed to be remanded to the Commission for such further proceedings as might be appropriate, it was with the thought that the Commission would give full effect to its duties in harmony with *the views we had expressed.*")
>
> *Chenery Corp. v. S.E.C.,* 154 F.2d 6, 8 (D.C. Cir. 1946) ("[T]he only question now open is whether the Commission has rightly construed and rightly followed *the opinion of the Supreme Court.*")

We submit once more, therefore, that it is only the opinion of the Supreme Court which need be construed in the present case and that the *Morris* decision has no application whatever.

---

*Unless otherwise noted, all emphasis in this memorandum is ours.

Near the close of its memorandum Sierra refers to the affidavit portion of its reply and presents a heads-I-win-tails-you-lose argument. The contention is that we cannot refute any misstatements in the affidavit because to do so only serves to show that there is a dispute as to the "meaning and effect of the mandate * * * of * * * the Court of Appeals for the District of Columbia Circuit." Such a dispute, says Sierra, will "conclusively demonstrate" that the dispute can only be properly resolved by that Court of Appeals. The fallacy in this neat argument, however, is demonstrated by what we have already noted, namely, that the meaning of the earlier Court of Appeals' opinion is quite immaterial. While it is understandable why Sierra might wish to ward off any attack upon the accuracy of Mr. Chanler's affidavit, we are not deterred from going to the truth of the matter by the fallacious contention that this will constitute a concession to Sierra's argument. We are not compelled to silence in the face of erroneous, distorting, and misleading statements even though they relate to matters entirely irrelevant to the issues presented by Sierra's motion.

II.

ANSWER TO "AFFIDAVIT"

Mr. Chanler's affidavit is a strange thing comprising very little fact and a great deal of argument. The argument, moreover, is all on Sierra's views as to the merits of the present petition for review. Apparently embarrassed, and with good cause, by his "excursion outside the record" on oral argument (in a patent effort to present his version of the case on the merits before a full record is brought up), counsel for Sierra now seems to think he may continue with his irrelevant argument on this motion if he combines his argument and his outside references into one big "affidavit."

We deplore having to counter such inexcusable* deviations from appellate procedure with references ourselves to matters outside the record. But in view of the fact that such references and the arguments based upon them have been made by Sierra, we deem it advisable to make a limited response, lest erroneous impressions be created by the affidavit in the absence of the full record.

The first error we note in the affidavit appears in its second sentence. There Sierra's counsel avers that the former appellate proceeding in this controversy resulted from the proceedings in F.P.C. Docket Nos. E-6482 and E-6697. We wish to point out that it was only Docket No. E-6482 which was involved in the earlier court review. Docket No. E-6697 is a new proceeding and was initiated by Sierra *after* the Supreme Court's opinion in this case was rendered. This separate proceeding by Sierra was then consolidated with the matter in Docket No. E-6482 upon motion by Pacific. When the full record comes up, all this will become clear. (But note Appendix, pp. 2, 4, Pet. to Review.)

In item "1" of the affidavit, Sierra states that the "facts" involved in this case can be found in the earlier opinion of the Court of Appeals. This averment creates the misleading impression that the "facts" related in that opinion either were admitted or were found to be true by the trier of fact, i.e., the Commission. Neither is true. The statements as to the nature and purpose of the 1948 rate contract which appear in the Court of Appeals' opinion and later in the definitive opinion of the Supreme Court are Sierra's *contentions* of fact before the Commission. These contentions were disputed by P. G. and E., but were never ruled upon by the Commission because the exact nature of the contract, it assumed, was immaterial (see *infra,* pp. 7-8). Since the Commission regarded Sierra's version of the facts as having no legal significance, the opinions of both the Court of Appeals and the Supreme Court had to state this version to pose the question presented—i.e., whether the facts asserted by Sierra would, if true, affect the validity of the Commission's order. That certain asserted facts would, if true, affect the validity of an order by no means establishes their truth. Nor does the statement of them in an appellate opinion fix what may be shown as the true facts on a retrial of the cause. (*Cf. Moore v. Trott,* 162 Cal. 268, 272-273, 122 Pac. 462, 464 (1912); *Thane Lumber Co. v. J. L. Metz Furniture Co.,* 12 F.2d 701 (8th Cir. 1926); *Roggenbuck v. Breuhaus,* 330 Ill. 294, 161 N.E. 780 (1928); *Mutual Life Ins. Co. v. Hill,* 193 U.S. 551, 553-554 (1904).)

---

*As a supposed excuse for launching into these extraneous matters on the present motion, Sierra's counsel asserted at oral argument that it was necessary to do so because of the point raised in our memorandum that the mandate involved in this case was that of the Supreme Court, not the Court of Appeals. (See also, Reply, p. 4.) The feebleness of this claimed excuse is only too obvious.

In item "2" of the affidavit, Sierra's counsel states that the California Public Utilities Commission "refused to permit PG&E to increase its contract rate with Sierra in 1952 * * *." This is far from the whole truth. As we stated in oral argument before this Court, the California Commission held that P. G. and E. had proven itself entitled to an increase in the rate embodied in the Sierra contract because P. G. and E.'s costs had mounted so severely since the contract was executed. But instead of directly *ordering* the rate to Sierra to be increased, it acceded to a request by Sierra that it be allowed to negotiate a new rate. (See *Re Pacific Gas & Electric Company,* 52 Op. and Or. P.U.C. of Calif. 111, 150-151, 96 P.U.R. (n.s.) 493, at pp. 524-525, 526 (October 15, 1952).) Having had its request granted, however, Sierra then refused to negotiate. Pacific thereupon filed an application before the California Commission calling attention to this refusal by Sierra.* Before the matter could be prosecuted, however, the decision in *United States v. Public Utilities Commission of Calif.*, 345 U.S. 295 (1953), came down, making it clear that the Federal Power Commission had jurisdiction over the entire matter. Accordingly, the California proceeding was dropped and only the Federal Power Commission proceeding was prosecuted. Thus it was Sierra's refusal to negotiate a rate increase as authorized by the California Commission that was the true inception of the present rate litigation.

Item "3" of the affidavit is simply a legal argument as to whether the true meaning of the 1948 rate contract, i.e., whether one for a changeable as opposed to a fixed rate, was an issue "left open" in the earlier proceeding in this case. It is not our purpose here on an incomplete record to state in full our argument on this point. Suffice it to say that we think the full record will make the following abundantly clear: (1) P. G. and E. argued to the Commission that the parties agreed to a changeable rate contract; (2) Sierra argued that the contract was for a fixed rate; (3) the Federal Power Commission made no finding on this question because it ruled that *any* contract could be changed under Section 205 of the Federal Power Act; (4) the Supreme Court reversed this ruling and held that a fixed rate contract, such as Sierra *contended* this one was, could be changed only under Section 206 of the Act; (5) the Supreme Court did not purport to decide the disputed factual question as to whether or not the parties had in fact agreed to a fixed rate, but, as in any appellate review, left these disputed factual contentions to be resolved, if required, by the trier of fact below; and (6) after the opinion of the Supreme Court made clear that a fixed rate contract could not be changed under Section 205 as the Commission had thought, the Commission should then have determined on the remand whether or not the parties to the contract had in fact agreed to a fixed rate.

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*Application No. 34029, filed January 20, 1953, with the California Commission.

In item "4" of the affidavit, Sierra's counsel argues that, despite an entire brief* by P. G. and E. before the Commission devoted to the single proposition that the contract here was for a "changeable" rather than a "fixed" rate, P. G. and E. cannot really be said to have urged the point before the Commission. The logic of such a position escapes us completely. It is true, as Sierra notes, that P. G. and E.'s contention as to the true meaning of the contract rate was advanced to counter the contention advanced by Sierra that the contract was understood by the parties to provide a firm rate for the entire life of the contract (a maximum of 30 years!). But, of course, there was no need for P. G. and E. to present its view on this point until Sierra contested what P. G. and E. regarded as the clear understanding of the parties—namely, that the rate was not intended to be fixed for thirty years, but was intended to change whenever the filed P-31 rate, on which the contract was based, was changed. (The P-31 rate was changed by the California Commission in 1952 in the proceeding already mentioned.)

In any event, we fail to see what difference it makes just how the question as to the nature of the contract rate arose in the Commission proceedings so long as it did arise and was briefed and argued. As the full record will show, the inescapable fact is that the Commission had the question before it, took evidence on it and heard argument on it, but did not decide the question because it ruled that *any* contract rate could be changed under Section 205 of the Federal Power Act. (See pp. 16-23, Exhibit "B" to our memorandum in opposition.)

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*A copy of this brief is appended to the affidavit as Exhibit A.

Sierra's further contention under this item that the *courts* had the "issue" of the nature of the contract rate before them and decided it is a complete misstatement and shows a gross misconception of the nature and function of judicial review. Since the Commission had decided that it made no difference under the Federal Power Act whether the contract rate was "fixed" as Sierra contended, it is elementary that the reviewing court had to decide the case on this very same basis. For it is a "fundamental rule" that "a reviewing court * * * must judge the propriety of [an agency's] action *solely* by the grounds invoked by the agency" (*S.E.C. v. Chenery Corp., supra,* 332 U.S. 194, 196 (1947)). When this court has the full record, it will see that the question whether the contract rate was in fact intended by the parties to be "fixed" for thirty years was never "decided" by the appellate courts. Indeed, they could not have decided it, for this issue was never reached by the Commission. And it is axiomatic that reviewing courts review only the issues reached and decided by agencies—nothing else. If legal error is found in the issues actually decided by an agency, the function of the reviewing court is at an end. Appellate procedure then requires that the case be returned to the agency for consideration afresh in the light of the correct principles of law announced by the reviewing court. As the Supreme Court has so aptly said:

> "[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration."
>
> *F.P.C. v. Idaho Power Company,* 344 U.S. 17, 20 (1952).

See also:

Davis on Administrative Law (1951), 611-612 ("[W]hen an agency considers a record involving many issues, decides the case on one ground, and then

> is met with judicial rebuff on that ground * * * the agency is free to reconsider the whole case on a new record.")
>
> *S.E.C. v. Chenery Corp., supra,* 332 U.S. 194, 201 (1947) ("After the remand was made * * * the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress.")

Item "5" of the affidavit is another purely legal argument. Its purpose apparently is to explain some of the differences appearing in the opinion of the Court of Appeals as compared with the opinion of the Supreme Court. The argument presupposes that such differences are significant and that the meaning of the Court of Appeals' opinion must be determined by the Ninth Circuit in deciding the case presented here by the instant petition to review. The argument concludes with the statement that, in view of the supposed necessity for construing the Court of Appeals' opinion, the Court of Appeals which wrote the opinion should construe it. Of course, the premise is false, as we have already noted (see above, pp. 2-3), for there is no necessity to construe the Court of Appeals' opinion.

Sierra also protests that it would be a bad thing for "efficient judicial administration" if the Ninth Circuit were to become burdened with the necessity of analyzing proceedings which found their way to the Supreme Court through the route of another circuit. (See esp. Reply, pp. 4, 3.) It seems appropriate here to point out that this "burden" has already been placed on the courts of the Ninth Circuit by Sierra itself—and long before the instant petition to review was filed. This Court will no doubt recall that during oral argument Sierra's counsel referred a number of times to an argument he made some weeks earlier "downstairs" before

Judge Carter in the District Court on Sierra's restitution action now pending there. This action, filed by Sierra in the District Court June 18, 1956, involves the construing of exactly the same mandate and opinion of the Supreme Court as is involved here. The amount of money at issue is substantial, and it is highly probable that an appeal in the action will come before this very Court of Appeals in due course. Thus we must note that Sierra's own conduct has already made it necessary for the courts of the Ninth Circuit to consider the meaning of the Supreme Court's mandate in the present matter. For an appreciation of this fact, we respectfully invite the attention of the Court to Judge Carter's recent memorandum opinion in this related case, handed down December 16, 1957, one week after the hearing on Sierra's present motion. For the convenience of the Court, we have appended hereto as "Exhibit A" a copy of this opinion.* In the light of Sierra's own action in bringing the Sierra rate dispute into the courts of the Ninth Circuit, we find a rather hollow ring in Sierra's protestations that "judicial efficiency" will be impaired if the Ninth Circuit is called upon to consider the meaning of the Supreme Court's mandate in this case. Indeed, since Sierra has already placed the jurisdiction of a good part of the Sierra controversy in the courts of the Ninth Circuit, it would seem that "judicial efficiency" would best be served if all parts of the controversy were litigated in this same circuit. (It is, of course, also the only circuit in which Sierra and P. G. and E. operate.)

Item "6" of the affidavit is another legal argument anticipatory of the argument on the merits of this case. Sierra's counsel attempts to state for us what our position on the merits will be and then gives his contrary position. He argues that the mandate involved in this case was "permissive" and did not "require" the Federal Power Commission to do anything (see also Reply, p. 6). Once again, we do not propose at this juncture to argue in full our case on the merits. Sierra, however, is mistaken in assuming that the issue is whether the Supreme Court's mandate was permissive or mandatory in form. There is no dispute over the fact that the Supreme Court returned the case to the Commission for "such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable" (350 U.S. at p. 355). The issues raised by our petition concern the correct posture of the case in the light of that opinion and the proper application of the principles there enunciated by the Supreme Court. With reference to the claimed "permissive" nature of the mandate, we think Sierra's counsel is concerning himself more with semantics than with substance. As a matter of substance it would make no difference whether the Commission erred because it failed to do something "required" or because it abused its discretion in acting under a "permissive" mandate. In either case, the Commission's failure to grant a hearing would be contrary to the law governing its action upon remand.

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*In order to follow the thought of the opinion, we have also appended hereto as "Exhibit B" and "Exhibit C," respectively, a copy of the complaint in the action and a copy of our motion to stay which was favorably acted upon in the memorandum opinion.

SUMMARY AND CONCLUSION

The two cases relied upon by Sierra for its motion to dismiss, *Morris v. S.E.C., supra,* 116 F.2d 896 (2d Cir. 1941), and *Hicks v. N.L.R.B., supra,* 100 F.2d 804 (4th Cir. 1939), are plainly inapplicable. Apparently realizing this, Sierra has chosen the occasion of its motion to launch into a discussion of the merits of the case by means of an "affidavit." Lest Sierra create any erroneous first impressions of this case before the full record is brought up, we have deemed it advisable to respond to this so-called affidavit with our own correcting references to the still-missing record. We genuinely regret, however, the necessity for doing so at this stage.

We submit that the motion to dismiss is utterly devoid of merit and should be denied.

Respectfully submitted,

F. T. Searls
Frederick W. Mielke, Jr.
Malcolm A. MacKillop
Attorneys for Defendant

Dated, San Francisco, California, January 13, 1958.

Appendix

EXHIBIT A

In the United States District Court for the Northern District of California, Southern Division

Civil No. 35591

Sierra Pacific Power Company,
Plaintiff,
vs.
Pacific Gas and Electric Company,
Defendant.

[Endorsed:] Original Filed Dec 16 1957 Clerk U.S. Dist. Court San Francisco

MEMORANDUM

Sierra Pacific Power Company (Sierra), having made a contract with Pacific Gas and Electric Company (P.G. & E.) for the purchase of electrical power from P. G. & E., brings this action for breach of the contract. The question presently before the Court is whether the action must be stayed, pending the completion of collateral proceedings before the Federal Power Commission (Commission) involving the same parties and the same contract.

The answer to this question can be reached only by an examination of the proceedings heretofore had by the parties before the Commission, the Court of Appeals for the District of Columbia, and the Supreme Court of the United States.

We take up these prior proceedings on June 17, 1954, when the Commission concluded, under § 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), that P. G. & E's rate increase was reasonable and therefore lawful, despite its contract with Sierra fixing a lower rate. The Commission might also have sustained the increase prospectively under § 206(a), by finding that the contract rate with Sierra was "* * * unjust, unreasonable, unduly discriminatory or preferential * * *"; however, the Commission was proceeding under § 205(e), had concluded that the increase could be sustained under that section, and only noted "* * * that if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 (contract) rate is unreasonably low and therefore unlawful."

The Court of Appeals for the District of Columbia, in 223 F.2d 605, set aside the Commission's approval order under § 205(e), holding that P. G. & E. could not thereby escape its contractual obligation to Sierra; it further refused to treat the proceeding in its existing posture as one under § 206(a), and remanded the case to the Commission "* * * with instructions either to dismiss the proceeding or for further proceedings under § 206(a)."

On March 23, 1955, Sierra successfully petitioned for an amendment of the remand order, whereunder the Commission was ordered to dismiss the proceeding *absolutely,* but "* * * without prejudice to the initiation of a *new* proceeding under § 206(a)." 237 F.2d 756.

This amendment brought into sharp focus the problem that had been raised by the Circuit Court's invalidation of the order of the Commission. While P. G. & E. might have been successful, under the terms of the Court of Appeals' initial order, in inducing the Commission to make new § 206(a) findings that the contract rate was nevertheless unreasonably low, and thus sustain the earlier Commission order granting the increase, it now became apparent from the mandate of *absolute* dismissal that P. G. & E. would have to refund the margin of increase theretofore collected.

The initiation of a *new* proceeding under §206(a) could only result in an order prescribing the rates "* * * to be thereafter observed * * *".

In its petition for certiorari, P. G. & E. complained of this result, and urged the Supreme Court to permit the Commission to reconsider the matter under § 206(a), and give it an opportunity to make a formal finding on the question of whether the contract rate was just, reasonable, or lawful for the period antedating the nullification of the Commission's order by the Court of Appeals.

The Supreme Court first affirmed the Court of Appeals in holding that the rate increase could not be sustained under § 205(a); it then held, *contrary* to the Court of Appeals, that "* * * the Commission's order here, if based on the necessary findings, *could* have been effective to prescribe the proposed rate as the rate to be in effect prospectively from the date of the order, June 17, 1954." under § 206(a). But the Court then held that the Commission's indication that the contract rate was unlawful was on its face based on an erroneous standard. It disposed of the case thusly:

> "We shall therefore affirm the order of the Court of Appeals, with instructions to remand the case to the Federal Power Commission for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable."

It is difficult to state with certainty whether the Supreme Court was, by this quoted language, responding to P. G. & E's plea for a remand for further findings under § 206(a), to be effective at the date of the Commission's original order. By referring to the lawfulness of the contract rate in the *present* tense, and declaring that "We shall therefore affirm the order of the Court of Appeals * * *", it can be inferred that P. G. & E.'s plea was being categorically rejected; however, the affirmance language appears to be *qualified* by the remand instructions "* * * for such further proceedings, not inconsistent with this opinion, as the Commission *may deem desirable.*" Insofar as the opinion had earlier emphasized that the Commission order *could have* been sustained had it contained appropriate § 206(a) findings, it seems apparent that the Supreme Court intended that the Commission *might* make such retroactive findings if it desired, i.e., if the original proceedings warranted it. Moreover, this remand language is in substance like the *initial* remand language of the Court of Appeals, which had been *amended* by the lower Court in the apparent belief that the Commission would otherwise be free to sustain its original order by making § 206(a) findings.

The Supreme Court was undoubtedly aware, both from the lower Court's amendment of its opinion and from P. G. & E's urgings as to the form of remand, that the possibility of retroactive findings by the Commission was of critical importance. It can be fairly concluded then, that by "* * * remand(ing) the case to the Federal Power Commission for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable.", the Supreme Court did *not* intend to foreclose Commission inquiry into the lawfulness of the contract rate as of June 17, 1954.

P. G. & E. advised Sierra that it construed the Court's order consistently with the foregoing, and Sierra thereupon moved that the Supreme Court supplement its order, to state that the Commission inquiry be limited to the lawfulness of the contract rate as of the time of remand. P. G. & E., by responsive brief, unequivocally declared to the Supreme Court that it interpreted the opinion as permitting Commission inquiry into lawfulness of the contract rate during the earlier period. In the face of this, the Court *denied* Sierra's motion to supplement the opinion. This Court must conclude therefore that P. G. & E.'s interpretation of the opinion is correct.

Pending final Commission determination of the legality of the contract rate as of June 17, 1954, the disposition of which is of critical importance to Sierra's right to proceed here, this Court is constrained to hold this action in abeyance for such time as is appropriate. *Atlantic Coast Line v. Florida,* 295 U.S. 301 (1935); *U. S. v. Morgan,* 307 U.S. 183 (1939). The record discloses that the Commission has by now acted in response to the remand, and refused to find the contract rate unlawful as of the time of its original order. However, P. G. & E. has appealed from that decision, and the Commission's determination is thus robbed of its finality; hence a stay is appropriate.

Counsel for defendant are directed to prepare and present an appropriate order in conformity herewith.

Dated: December 13, 1957.

Oliver J. Carter
United States District Judge

EXHIBIT B

WILLIAM C. CHANLER,
WINTHROP, STIMSON, PUTNAM & ROBERTS
40 Wall Street,
New York 5, N.Y.
Telephone: WHitehall 3-0700.
GREGORY A. HARRISON,
BROBECK, PHLEGER & HARRISON,
111 Sutter Street,
San Francisco 4, California.
Telephone: SUtter 1-0666.
Attorneys for Plaintiff,
Sierra Pacific Power Company.

In the United States District Court for the Northern District of California, Southern Division

Civil No. 35591

Sierra Pacific Power Company,
Plaintiff,
vs.
Pacific Gas and Electric Company,
Defendant.

[Endorsed:] Original filed June 18 1956 Clerk, U. S. Dist. Court San Francisco

COMPLAINT

Plaintiff above named, complaining of the defendant, alleges as follows:

Count I

1. Plaintiff is a corporation incorporated under the laws of the State of Maine, and defendant is a corporation incorporated under the laws of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

2. Plaintiff is a public utility under the laws of the States of Nevada and California and is engaged in the business of generating, transmitting and distributing electricity to consumers in northwestern and central Nevada and eastern California, and defendant is a public utility under the laws of the State of California and under the provisions of Part II of the Federal Power Act (§ 213 of the Act of August 26, 1935, c. 687, 49 Stat. 847, 16 U.S.C.A. §§ 824-824h) and is engaged in the business of generating, transmitting and distributing electricity primarily in north central California.

3. On or about March 4, 1948, defendant entered into a contract with plaintiff, a true copy of which is hereto annexed, marked Exhibit A, and made a part hereof, pursuant to which defendant agreed among other things to sell and deliver to plaintiff all of the electric energy required by it for distribution to its customers in Nevada and California, except such as may be produced by plaintiff's then existing facilities and certain other minor exceptions, at rates fixed by a certain schedule contained in said contract, until December 31, 1964.

4. Plaintiff has duly performed all the conditions of said contract on its part to be performed.

5. As required by its terms, said contract was duly approved by the Public Utilities Commission of the State of California by an order of the said Commission dated April 27, 1948, authorizing plaintiff and defendant to "deliver and charge for on the one hand and receive and pay for on the other, electric energy at the rates and under the conditions provided in said contract."

6. On or about September 7, 1953 defendant breached said contract by failing and refusing to sell and deliver electric energy to plaintiff at the rates provided therein.

7. By reason of the foregoing, plaintiff has sustained damages in the sum of $1,226,729.76, no part of which has been paid except the sum of $336,821.53.

Count II

8. Plaintiff repeats and realleges as part of this count each and every allegation contained in paragraphs 1, 2, 3, 4 and 5 of this complaint with like effect as if herein fully realleged.

9. The said contract was duly filed with the Federal Power Commission on or about June 7, 1948, and has been and is now on file with the said Commission as defendant's Rate Schedule FPC No. 3.

10. Said contract contains a covenant of good faith and fair dealing, which covenant is implied in fact and in law, that defendant will not voluntarily take any action either for the purpose or with the effect of destroying or injuring the rights of plaintiff to receive the benefits and fruits of the contract.

11. On or about February 2, 1953 defendant breached the said covenant of good faith and fair dealing by voluntarily filing with the said Federal Power Commission, unlawfully and without plaintiff's consent, a new schedule of rates substantially higher than the rates stipulated in the contract. Said new schedule, designated as Supplement No. 1 to the said Rate Schedule FPC No. 3, provided by its terms that it was to be applicable to service to plaintiff under the conditions set forth in the contract and that "Said contract shall remain in full force and effect except as to section 4 thereof, which section shall be superseded in its entirety by the provisions of this rate schedule."

13. The intent, purpose and effect of said filing was to procure certain orders of the Federal Power Commission respectively issued by said Commission on March 13, 1953, September 28, 1953 and June 17, 1954, pursuant to which plaintiff was required to make payments to defendant at the schedule of increased rates set forth in said Supplement

No. 1 rather than at the rates stipulated in said contract for the period from September 6, 1953 to on or about February 1, 1956. On February 27, 1956 the said filing and the said orders were held invalid by the Supreme Court of the United States.

14. By reason of the foregoing, plaintiff has sustained damages in the sum of $1,226,729.76, no part of which has been paid except the sum of $336,821.53.

Count III

15. Plaintiff repeats and realleges as part of this count each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 9 and 10 of this complaint with like effect as if herein fully realleged.

16. On or about February 2, 1953 defendant, without plaintiff's consent, filed with the said Federal Power Commission a new schedule of rates substantially higher than the rates stipulated in said contract, and designated as Supplement No. 1 to defendant's Rate Schedule FPC No. 3.

17. On or about March 13, 1953 the Federal Power Commission issued an order suspending the effective date of said Supplement No. 1 until September 6, 1953, and ordered a hearing as to the reasonableness thereof.

18. On or about March 13, 1953 plaintiff filed a petition with the said Commission, and on or about March 23, 1953 plaintiff filed an amended petition, requesting the Commission to reject the filing by defendant of said Supplement No. 1 on the ground that, by such filing, defendant could not unilaterally change its contract with plaintiff.

19. On or about April 17, 1953 the said Commission issued an order denying plaintiff's petitions.

20. Pursuant to the Commission's order of March 13, 1953, and a further order issued by it on September 28, 1953, the rates set forth in Supplement No. 1 became effec-

tive as of September 6, 1953, and remained the effective rates pending further hearing and determination by the Commission as to their lawfulness.

21. After hearings and argument before the Commission, it issued an order on June 17, 1954 rejecting plaintiff's contention that the contract rates could not be unilaterally increased by the filing, of Supplement No. 1, and holding the rates prescribed in said Supplement to be lawful.

22. Thereafter plaintiff duly filed its petition for review of the said order of June 17, 1954 with the United States Court of Appeals for the District of Columbia Circuit, and on February 24, 1955 that Court held that the contract rates could not be increased by the unilateral filing of a schedule of higher rates without plaintiff's consent and set aside the order under review.

23. On February 27, 1956, the Supreme Court of the United States in an opinion, a copy of which is annexed hereto as Exhibit B, held that neither the filing of Supplement No. 1 nor the Commission's order was effective to change the contract rates and affirmed the judgment of the Court of Appeals setting aside the Commission's order of June 17, 1954.

24. Between the 6th day of September, 1953, and the 1st day of February, 1956, under compulsion of the said invalid orders of the Federal Power Commission, defendant has paid plaintiff for electric energy delivered to it an aggregate amount of $1,226,729.76 in excess of the rates stipulated in said contract.

25. On or about the 26th day of March, 1956, plaintiff duly demanded of defendant that it repay plaintiff the said sum of $1,226,729.76 with interest, but said defendant refused and still fails and refuses to pay any part thereof except the sum of $336,821.53, which sum is the amount paid in excess of the contract rates between the 6th day of Sep-

tember, 1953 and the 16th day of June, 1954, and was repaid together with interest thereon on March 30, 1956.

WHEREFORE, plaintiff demands judgment against defendant in the sum of $889,908.23 together with interest at seven per cent. per annum on $20,694.22 thereof from the 23rd day of July, 1954 and on $41,011.47 thereof from the 19th day of August, 1954 and on $44,561.04 thereof from the 24th day of September, 1954 and on $41,908.64 thereof from the 22nd day of October, 1954 and on $41,153.13 thereof from the 17th day of November, 1954 and on $43,291.91 thereof from the 20th day of December, 1954 and on $46,680.32 thereof from the 25th day of January, 1955 and on $47,798.75 thereof from the 25th day of February, 1955 and on $43,397.18 thereof from the 18th day of March, 1955 and on $44,398.95 thereof from the 22nd day of April, 1955 and on $40,502.16 thereof from the 25th day of May, 1955 and on $41,224.87 thereof from the 24th day of June, 1955 and on $42,700.28 thereof from the 27th day of July, 1955 and on $45,231.47 thereof from the 26th day of August, 1955 and on $51,602.75 thereof from the 21st day of September, 1955 and on $47,323.39 thereof from the 19th day of October, 1955 and on $48,933.53 thereof from the 25th day of November, 1955 and on $51,005.49 thereof from the 28th day of December, 1955 and on $53,589.87 thereof from the 18th day of January, 1956 and on $55,342.84 thereof from the 24th day of February, 1956, together with the costs of this action.

WILLIAM C. CHANLER
William C. Chanler

WINTHROP, STIMSON, PUTNAM & ROBERTS
Winthrop, Stimson, Putnam & Roberts

GREGORY A. HARRISON
Gregory A. Harrison

BROBECK, PHLEGER & HARRISON
Brobeck, Phleger & Harrison

EXHIBIT C

F. T. SEARLS
FREDERICK W. MIELKE, JR.
MALCOLM A. MACKILLOP
245 Market Street
San Francisco 6, California
Telephone SUtter 1-4211
Attorneys for Defendant.

In the United States District Court for the Northern District of California, Southern Division

Civil No. 35591

Sierra Pacific Power Company,
Plaintiff,
vs.
Pacific Gas and Electric Company,
Defendant.

[Endorsed:] Original filed Sep 13 1957 Clerk, U. S. Dist. Court San Francisco

NOTICE OF MOTION TO STAY

To Plaintiff and Its Attorneys:

PLEASE TAKE NOTICE that on Monday, September 23, 1957, at 9:30 a.m., or as soon thereafter as counsel can be heard, at the United States District Court, Room 244, Post Office Building, Seventh and Mission Streets, San Francisco 1, California, defendant will move the above entitled Court to stay further proceedings in the above entitled matter and to grant defendant the following additional time within which to make any pleading, motion, or other response to the complaint: Thirty (30) days after the proceedings initiated before the Federal Power Commission bearing docket numbers E-6482 and E-6697, including any judicial review thereof, have been finally terminated and a decision of the Federal Power Commission thereon has become final without further possibility of review.

Said motion will be based upon the papers on file herein and on the points and authorities filed herewith.

DATED: September 13, 1957.

F. T. SEARLS
FREDERICK W. MIELKE, JR.
MALCOLM A. MACKILLOP
Attorneys for Defendant.

POINTS AND AUTHORITIES

This motion is in effect a renewal of defendant's original motion to stay filed herein August 3, 1956, to which we respectfully invite the attention of the court.[1]

In the previous motion we pointed out that the action here must be stayed because of the direct proceedings under way before the Federal Power Commission for the determination of the lawfulness of the rate sought to be enforced by Sierra in the action here. Until a final decision was reached in those proceedings, we pointed out, a judicial remedy could not be had.

A final decision has still not been reached in the direct proceedings started before the Commission. Although the Commission has made an initial decision disposing of the case on legal grounds without deciding the merits,[2] this decision is not final. The decision is subject to judicial review, and P. G. & E. is taking the necessary steps to secure such a review.[3] The direct proceedings initiated before the Commission, therefore, are not yet concluded. Until they are, it is clear that the District Court must stay its hand in the action here. (See points and authorities accompanying our previous motion to stay filed herein August 3, and supplemental points and authorities filed herein August 18, 1956.)

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[1] The previous motion to stay was not acted upon because plaintiffs agreed to stay all proceedings herein until further notice. A court order was entered giving effect to this agreement. (See order of court filed herein December 14, 1956.)

[2] A copy of this decision issued July 10, 1957, is appended as Exhibit B to plaintiff's recent motion for summary judgment dated August 23, 1957.

The correctness of our basic position on the original motion to stay was virtually conceded by Sierra when it agreed to postpone all hearings in the present action until after the Commission acted.[4] In attempting to reactivate the action now, Sierra overlooks that the same reasons which required a stay of this action previously while the direct proceedings were in process before the Commission also require a stay of the action now while the direct proceedings are carried forward to the United States Court of Appeals for review of the Commission's order and possible reversal of it.

The essential reason a stay is required during the pendency of the direct proceedings is, of course, that a remedy cannot be granted by this court which will be inconsistent with the decision finally reached in those direct proceedings. (See again the points and authorities accompanying the original motion to stay.) Obviously, until those proceedings are finally concluded, it cannot be known whether or not the judicial remedy sought by plaintiff here will be inconsistent with the outcome of the administrative proceedings. The court, therefore, must stay its hand pending the *final* outcome of those proceedings. As was said in *Thompson v. Texas Mexican Ry.,* 328 U.S. 134, 151 (1946):

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[3] Under the Federal Power Act, the preliminary step for obtaining a judicial review of an order of the Commission is the filing of an application for rehearing. (Federal Power Act § 313(a), 49 Stat. 860, 16 U.S.C. § 825L(a).) P. G. and E. filed such an application August 9, 1957, and the application was denied by the Commission September 6, 1957. P. G. and E. may now obtain a judicial review of the Commission's order of July 10, 1957, by filing an application for review any time within 60 days from the date of denial of the application for rehearing. (Federal Power Act § 313(b), 49 Stat. 860-861, 16 U.S.C. § 825L(b).)

[4] See footnote 1, page 2, above. [Page 13 of this Appendix]

> "[T]he court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature. . . . [T]he case [must] be held pending the *conclusion* of appropriate administrative proceedings." (Emphasis ours.)

We submit, therefore, that the reasons set forth in our original motion to stay remain valid and that the action here must be stayed until the *final* result of the administrative proceedings is known.

Respectfully submitted,

F. T. SEARLS
FREDERICK W. MIELKE, JR.
MALCOLM A. MACKILLOP
Attorneys for Defendant.

EXHIBIT A

No. 15,773

In the

United States Court of Appeals

For the Ninth Circuit

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner,* vs. FEDERAL POWER COMMISSION, *Respondent.* SIERRA PACIFIC POWER COMPANY, *Intervener.*	

Petition for Rehearing

F. T. SEARLS
FREDERICK W. MIELKE, JR.
MALCOLM A. MACKILLOP
245 Market Street
San Francisco 6, California

Attorneys for Petitioner

PARKER PRINTING COMPANY, 150 FIRST STREET, SAN FRANCISCO

EXHIBIT A TO PETITIONER'S
SUPPLEMENTAL MEMORANDUM
ON JURISDICTION AND PROCEDURE
DATED OCTOBER 2, 1958

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No. 15,773

In the

United States Court of Appeals

For the Ninth Circuit

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,
vs.
FEDERAL POWER COMMISSION,
Respondent.
SIERRA PACIFIC POWER COMPANY,
Intervener.

Petition for Rehearing

Petitioner respectfully prays that this Court grant a rehearing to reconsider the Court's opinion herein filed February 14, 1958, for the following reasons:

1. This Court has ignored the legislative mandate expressed in the clear language of § 313(b) of the Federal Power Act[1] which allows the aggrieved party to select the venue most convenient to him, and has failed to give effect to the language "such order" appearing in the statute.

2. The policy of avoiding possible judicial conflicts upon which this Court bases its opinion has, historically, not been applied to a situation such as is presented in this case. This

---

[1] 49 Stat. 860, 16 U.S.C. 825 l.

Court should, rather, adopt a policy of assisting the District Court in the Ninth Circuit resolve litigation before it.

3. There is no possibility of a conflict with either the Court of Appeals for the District of Columbia Circuit or the Supreme Court in any event, for the questions which this Court would be called upon to decide are entirely different from those decided by those courts and the record which this Court would be asked to consider would be only that record made subsequent to the Supreme Court's remand.

4. Even if this Court should not be convinced that it has jurisdiction to hear Petitioner's petition, it should exercise the power which it clearly has to transfer the petition to the District of Columbia Circuit so that Petitioner will not be completely deprived of a hearing.

5. The jurisdictional question decided by this Court is important to the conduct of appeals from at least six other administrative agencies besides the Federal Power Commission and warrants either a rehearing en banc or a certification of that question to the Supreme Court.

An examination of the foregoing points follows.

I. This Court's Opinion Conflicts with the Clear Language of Section 313(b) of the Federal Power Act.

This Court's opinion makes it clear that neither *Hicks v. N.L.R.B.*, 100 F.2d 804 (4th Cir. 1939) nor *Morris v. S.E.C.*, 116 F.2d 896 (2d Cir. 1941), relied upon by Intervener, are applicable here. However, seeking to avoid "the hazard of confusing or unseemly discord between two courts of appeal," the source of which discord the opinion does not specify, and to discourage what it considers "forum shopping" this Court holds not only that it has no venue but also that it has no *jurisdiction!* The mere possibility of "discord" is in and of itself no ground for a court to decline to exercise its *jurisdiction* and thus deprive a litigant of his day in court. Nor is a litigant to be condemned as merely "forum shopping" when he relies upon the substantial right of convenience given him by the legislature to seek relief in the Circuit in which he does business rather than in a Circuit three thousand miles away.

Having found no precedent for dismissal under the facts shown here, this Court is bound only by the provisions of § 313(b) and is obligated to follow the mandate there laid down by the legislature. As this Court itself notes, that section invests all courts of appeal with *jurisdiction* to review orders of the Commission, restricted only by the *venue* provisions which require that a petition for review be filed in either the circuit where the utility is located or has its principal place of business or in the District of Columbia Circuit. There is no dispute, therefore, that within the terms of the statute this Court has both *jurisdiction* and *venue* to hear the petition—and that Petitioner is not to be condemned as "forum shopping" when it chooses the convenient forum which the legislature has provided unless some other clear *provision of the statute* takes either jurisdiction or venue away from this Court.

The only limitation on jurisdiction found in § 313(b) occurs when a petition to review an order of the Commission has been filed in a particular Circuit and the Commission has filed the transcript in that Circuit. That Circuit then has "exclusive jurisdiction to affirm, modify, or set aside *such order* in whole or in part. * * *" (16 U.S.C. 825 l. Emphasis added.) This Court's opinion, however, would expand this statutory language to read "such order or any subsequent order in the proceedings, involving the same parties and same general controversy." That, however, is not what the legislature said.

We submit that the Court has failed to give effect to the word "such" preceding the word "order" in the statutory language just quoted. The term "such order" in that language makes abundantly clear that the statute does *not* give to one court for all time the exclusive jurisdiction to review every Commission order relating to a particular rate or contract whenever that rate or contract once becomes the subject of a controversy. For example, the contract between the parties here runs for a minimum of fifteen years with an option to extend for another fifteen years. It can last until 1971. Does § 313(b) mean that over the next thirteen years, until 1971, all orders of the Federal Power Commission involving these same parties and this same contract must be reviewed only in the District of Columbia Circuit because that Circuit reviewed the first order issued pertaining thereto? Of course not. The statute is very explicit. It clearly limits the "exclusive jurisdiction" to the single order brought up for review. In plain language, it says that a party aggrieved by *an* order may petition one of several courts for a review of *that* order and, when a transcript covering that order has become filed, that court shall have exclusive jurisdiction to affirm, modify, or set aside *"such"* order. The only exclusive jurisdiction granted is the jurisdiction to review "such" order—nothing more. We submit, therefore, that this Court has totally nullified the effect of the word "such" appearing in the statute quoted in its opinion.

The exclusive jurisdiction provision of § 313(b), moreover, is obviously aimed only at the situation where several parties aggrieved by a particular order each seeks a review of that same order in several different circuits. That is not the situation here. All parties, and the only petition for review, are before this one Court. No parties and no petitions are before any other court of appeals. Nor is the order to be reviewed here the "such order" reviewed previously by the

District of Columbia Circuit. It is an entirely different order of the Commission, entered in a new background and involving new issues.

An example may best illustrate the foregoing argument. Suppose the District of Columbia Circuit's original order requiring a dismissal without prejudice to a new filing by Petitioner under § 206 had been allowed to stand. Suppose further that Petitioner had filed such new proceeding setting forth the very same questions as were raised in its motion to reopen after the Supreme Court's remand, and the Commission had dismissed the new proceeding with an order couched in the same language contained in its order of July 10, 1957, sought to be reviewed here. Surely, this Court would not say it had no jurisdiction of a petition to review *that* order. In short, this Court, by its decision herein, has placed form above substance and would frustrate the obvious intent of the Supreme Court in reversing the District of Columbia Circuit's order of dismissal so that form would not be placed above substance, thus making it possible for the proceeding to continue without the initiation of an entirely new proceeding under § 206.

There can be no question that the overriding policy behind § 313(b) is the salutary one of allowing the *aggrieved party* to select the forum convenient to *it*. In *Panhandle Eastern Pipe Line Co. v. F.P.C.*, 324 U.S. 635, 639 (1945), the Supreme Court said:

> "Venue relates to *the convenience of the litigants.* * * * The provisions [of the Natural Gas Act] plainly are of that character. * * * Review in any circuit where the * * * company is located or has its principal place of business is designed *to serve the convenience of the company.*" (Emphasis added.)

And it is equally clear that when Congress has specified which courts are deemed convenient, the courts are not to make contrary determinations. As the court stated in *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 124 F.2d 50, 53 (6th Cir. 1941) (aff'd. 318 U.S. 9):

> "Venue, under the National Labor Relations Act, is wholly *a matter for Congress.* It is manifest from the statute in question that the Congress had conferred jurisdiction on the Circuit Court of Appeals wherever the employer found guilty of unfair labor practices transacts business. It is conceded that the respondent is carrying on business within the territorial limits of this court.
>
> * * * * * * *
>
> *"Our jurisdiction of the present case cannot be declined or renounced, even though it may appear preferable that the cause should have been brought in another jurisdiction authorized by the statute."* (Emphasis added.)

It is clear therefore that we are here concerned by what Congress has dictated. We are concerned with the convenience of the *aggrieved party,* not the courts in deciding whether the petition should be dismissed. "After all, in the absence of a strong showing to the contrary, a citizen must be left free to choose the forum in which he may bring suit within the limit of the places for litigating the matters involved that is provided for by law." *U.S. Industrial Chemicals Inc. v. Carbide & Carbon C. Corp.*, 52 F. Supp. 164, 167 (S.D. N.Y. 1953).

II. The Policy Upon Which the Court Bases Its Opinion Is Not Applicable in This Case.

Assuming that the clear language of a legislative mandate can be overriden purely on the ground of policy, any such overriding policy should certainly be of the most compelling nature.[2] The avoidance of possible judicial conflicts has, historically, not been considered such a strong and compelling policy, particularly when applied to facts like those presented in this case. In 1865, for example, the Supreme Court, in *Buck v. Colbath,* 70 U.S. 334, 335, spoke as follows:

> "[I]t is not true that a court, having [once] obtained jurisdiction of a subject-matter of a suit, and of parties before it, *thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court,* and, in some instances, requiring the decisions of the same questions exactly." (Emphasis ours.)

Particularly is this true when the proceedings in the first court which obtained jurisdiction have been terminated.

> "[W]here the proceeding in the court first acquiring jurisdiction is terminated * * * then another court of concurrent jurisdiction may take jurisdiction of the same subject matter." 14 Am. Jur. 445.

See also cases collected at:

> 21 C.J.S. 753. ("[A]ssumption of jurisdiction by another court is permissible * * * where jurisdiction [of the first court obtaining jurisdiction] has been terminated * * *.")

Here there can be no doubt that the proceedings in the Court of Appeals for the District of Columbia Circuit have terminated. The jurisdiction of that court, therefore, is at an end. There is now *no Commission order, no petition,* and *no transcript* in or before that court. As was said in

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[2] In the *Morris* case the overriding policy was the recognized one of allowing an appellate court to construe its own mandate when the review of a second agency order required a construction of that mandate. This Court has recognized that such policy is not involved here because we are not concerned with construing a mandate of the District of Columbia Circuit (Printed opinion, p. 7).

Natural Gas Pipeline Co. v. F.P.C., 141 F.2d 27, 28 (7th Cir. 1944):

> "[J]urisdiction [cannot] be established under the original suit, because the original suit was terminated upon the filing of the mandate of the Supreme Court * * *."

Yet this Court holds that, even though nothing relating to this case is now before the District of Columbia Circuit, that court has exclusive *jurisdiction!*

By declining to exercise the authority it is called upon to exercise under the venue provisions of § 313(b), this Court is acting contrary to the clear language and policy established by the statute and contrary to the authorities above cited.

The statute, the authorities, and the policies they incorporate are eminently fair and they demand adherence. Their fairness is illustrated by this very case. Here, in 1954, Intervener was "aggrieved" by a Commission order and appealed from it. Intervener controlled that appeal and chose the venue which suited its own convenience. The statute gave it that right, and no one has accused Intervener of having merely engaged in "forum shopping" when it exercised that plain statutory right. In 1957 the Commission made a new order on entirely different questions in the same proceeding. By this order, Petitioner has become aggrieved. As did Intervener on its appeal, Petitioner has now relied upon the same clear language of § 313(b) relating to venue and has chosen to place venue in this Court, which is convenient to it, for review of the new order and the new questions arising under it. Now, however, this Court would deny Petitioner the important right of convenience previously enjoyed by Intervener—to have a hearing in the most convenient court chosen under the express provisions of the statute. The effect of that denial is to allow Intervener to freeze the venue to review orders relating to the contract and rates which are now the subject of controversy even though Intervener, as in the present case, is not the aggrieved party with the right to appeal. The error in such a view, and its unfairness, was pointedly commented upon by the writer in 53 Harv. L. Rev. 332 (1939) when he argued that such a view should not be imputed to the Fourth Circuit under its decision in *Hicks v. N.L.R.B.*, 100 F.2d 804 (4th Cir. 1939). We quote:

> "[I]t is questionable whether the original court has continuing jurisdiction so that the exclusiveness of its right to review persists beyond the termination of the original action. * * * It is arguable * * * that [the tribunal open to an aggrieved party] should not be fixed by the fact that [another party] deems it desirable to start proceedings in a circuit a thousand miles away."

A. The Ninth Circuit is already involved in the subject matter in controversy.

This Court would deny Petitioner the substantial right to a hearing on the merits because this Court wishes to avoid contact with the general controversy between Petitioner and Intervener. A Federal trial court in the Ninth Circuit, however, is *already* involved with the controversy, and it is almost a certainty that the Court of Appeals for the Ninth Circuit will, sooner or later, have to come to grips with the controversy. As this Court has been informed, Intervener has brought a proceeding in this Circuit in the form of an action in the U. S. District Court for the Northern District of California, Southern Division, for restitution. The determination of that action involves a determination of some of the very questions involved in the Petition for Review herein. It was because these questions were also pending in the present proceeding before this Court that the District Court stayed its hand for the time being in the restitution action.[3] If this Court's dismissal of the petition for review is sustained, however, the restitution action will go forward to a trial on the merits.[4] The jurisdiction of the Ninth Circuit is therefore irrevocably involved with the basic subject matter of the present controversy whether or not the present petition to review is dismissed.

Perhaps this point can be made clearer by examining the basis of Intervener's restitution action in the District Court. Prior to the filing of that action and immediately following the decision of the Supreme Court in *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, Intervener petitioned the Supreme Court to amend and supplement the last sentence of its opinion to read as follows (the proposed amendment appears in italics):

> "* * * We shall therefore affirm the order of the Court of Appeals, with instructions to remand the case to the Federal Power Commission for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable *to determine the lawfulness of the contract rate at the time of such further proceedings, and if found unlawful, to fix the rate thereafter to be observed and in force. Any amounts paid by Sierra in excess of the contract rate on the basis of the erroneous order of the Commission were unlawfully collected, and PG&E is obligated to make restitution of the excess payments.*"[5]

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[3] The opinion of the District Court is attached as Exhibit "A" to Petitioner's "Memorandum In Answer To Intervener's Reply Memorandum On Motion To Dismiss."

[4] Involved, among other things, will be the question of whether the parties agreed to a fixed or changeable rate, one of the questions we are asking that the Commission be required to determine first. See, for example, "Affidavit of N. R. Sutherland," page 39 of Appendix to the Petition for Review, which affidavit is also before the District Court.

[5] "Motion By Respondent, Sierra Pacific Power Company, To Amend and Supplement Last Sentence of the Court's Opinion" before the Supreme Court.

Petitioner opposed the motion.[6] It conceded that under the Court's order Petitioner would have to refund any increase collected under § 205 of the Federal Power Act during the pendency of the proceedings and prior to the Commission order of June 17, 1954. In fact, Petitioner had already refunded those sums, and it so informed the Supreme Court. It contended, however, that the disposition of any increase collected after June 17, 1954, must be based upon a finding by the Commission as to whether the contract rate was in fact contrary to the public interest subsequent to June 17, 1954, for if the rate were against the public interest there would be no basis in law or equity for making a refund. Petitioner's contention was based on *Atlantic Coast Line R. Co. v. Florida,* 295 U.S. 301 (1935), *Morgan v. U.S.,* 304 U.S. 1 (1938), and *Morgan v. U.S.,* 307 U.S. 183 (1939).

The Commission opposed the motion on the same grounds.[7] It argued that if, *"in reopened proceedings,"* it found the contract rate unlawful by the Supreme Court's standards, Intervener might have no better claim to restitution than the shipper in *Atlantic Coast Line R. Co. v. Florida, supra,* 295 U.S. 301 (1935).

The Supreme Court denied Intervener's motion (*F.P.C. v. Sierra Pacific Power Co.,* 351 U.S. 946 (1956)). Presumably it agreed that the right to restitution depended, at least in part, on the finding, yet to be made by the Commission on proper grounds, as to whether the contract rate was so low as to adversely affect the public interest.[8]

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[6] "Brief of Pacific Gas and Electric Company In Opposition To Motion To Amend and Supplement Last Sentence of the Court's Opinion" before the Supreme Court.

[7] "Memorandum For The Federal Power Commission In Opposition To Respondent's Motion For Amendment Of Opinion" before the Supreme Court.

[8] This is also the interpretation taken by Judge Carter in the District Court action. (See Exhibit "A" to Petitioner's "Memorandum In Answer To Intervener's Reply Memorandum On Motion To Dismiss.")

Despite the Commission's contention before the Supreme Court that it should be left free in "reopened" proceedings to find whether the contract rate was so low as to adversely affect the public interest, it has refused to make a finding on this question. As pointed out in our Petition to Review, the Commission has merely observed that the contract rate "may or may not" adversely affect the public interest. (Petition to Review, p. 9) In other words, though recognizing the possible adverse affect on the public, it has refused to reopen the proceedings so that it might bring its expert judgment to bear and make a finding. A more cavalier disregard of its obligation to protect the public interest, let alone its obligation to the Supreme Court, can hardly be imagined.

B. This Court should adopt a policy of assisting the District Court of this Circuit to resolve the litigation before it.

From the foregoing discussion, one more point presents itself on the matter of policy. In weighing the proper course to be taken, this Court should balance against the policy of avoiding judicial conflicts, upon which it bases its opinion, a policy of *assisting* other courts to decide matters before them—particularly other courts in the Ninth Circuit. Under the doctrine of "primary jurisdiction" the Commission, not the courts, should find whether or not the contract rate is against the public interest. Now there is no finding except that the rate "may or may not" be against the public interest, which is really no finding at all. If a *finding* were made, it would materially aid the District Court in determining the case before it and might well result in preventing that case from ever reaching this Court on appeal. This Court could achieve that result by exercising its jurisdiction in this case and remanding to the Commission to take further evidence and make findings. Such procedure, if adopted by this Court, would not "be wasteful of court time and energy" but would save the time and energy of other courts, and this Court at another time. Thus, both under the law and under principles of policy, equity, and justice, this Court can and should—must—exercise the jurisdiction given it.

III. There Is No Possibility of a Conflict with the Court of Appeals for the District of Columbia or the Supreme Court.

Finding no precedent requiring the result reached in its opinion, this Court has based its decision entirely upon a policy of avoiding "judicial collisions and conflicts involving the same parties and controversies." We have already seen that this policy is not controlling here because, among other reasons, the controlling policy is that fixed by Congress when it gave the party "aggrieved" the right to select venue according to his convenience so that he would not have to present his case in a forum thousands of miles away. We wish now to show that the possible "conflict" which the Court fears cannot possibly occur in any event. To show this it is only necessary to compare the prior court proceedings, already accurately stated in this Court's opinion, with the relief sought by Petitioner.

The one and only question decided by the Court of Appeals for the District of Columbia in *Sierra Pacific Power Co. v. Federal Power Commission*, 223 F.2d 605; 237 F.2d 756, is best stated in that Court's own language:

> "The novel and important question for decision is whether and to what extent the pre-existing right of utilities to enter into enforceable rate contracts has been abrogated by the Commission's power under the Act to regulate rates."

The Court then examined the Federal Power Act. It determined that "In modifying a filed rate under § 205, it is not necessary to prove that the original rate is unjust or unreasonable; the new rate will take effect if the utility sustains the burden of proving that it is 'just and reasonable'," and that "Under § 206(a), on the other hand, a finding of unreasonableness *is* a prerequisite to modification of a filed rate" (223 F.2d 607). The Court then answered the question it had set out to decide by holding, as stated by this Court in its opinion, "that a fixed-rate contract * * * could be changed only upon a finding by the Commission, pursuant to § 206(a), that such rate was unreasonable" (Printed opinion herein, p. 2). Further, as this Court also noted, the court there found that unreasonableness of the contract rate was not an issue in the § 205(e) proceedings which the Commission had conducted. The District of Columbia court then directed a dismissal of the Commission proceedings without prejudice to the initiation of a new proceeding under § 206(a).

Turning to the decision of the Supreme Court, *Federal Power Commission v. Sierra Pacific Power Co., supra* 350 U.S. 348, we find, at page 352:

> "The first question before us is whether P.G.&E.'s unilateral filing of the new rate under § 205(d), and the approval of the new rate by the Commission under § 205(e), were effective to supersede P.G.&E.'s contract with Sierra."

The "further question" decided by the Supreme Court was whether the proceedings before the Commission "satisfied in substance the requirements of § 206(a)." (350 U.S. 353)

The answer to both questions was "No." The Supreme Court did not require dismissal, however, stating that "it would seem immaterial that the investigation was begun as one into the reasonableness of the proposed rate rather than the existing contract rate." (350 U.S. 353) The Supreme Court stated that "Whether under the facts of this case the contract rate is so low as to have an adverse effect on the public interest is of course a question to be determined in the first instance by the Commission". (350 U.S. 355) Accordingly, it remanded the case "for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable."

None of the questions considered by the two courts, as above set forth in the courts' own language, is before this Court for determination. Not being asked to decide the same questions, how can there be a conflict? Petitioner agrees that the law now is, as decided by those cases, that a fixed rate contract cannot be changed by a filing under § 205 of the Federal Power Act. Aside from the question of whether the Commission should be directed to dismiss the proceedings, that was the only question determined by either Court. In fact, Petitioner agrees wholeheartedly with the District of Columbia Circuit's statement that the unreasonableness of the contract rate was not the issue which Petitioner was called upon to meet in the proceedings as conducted by the Commission. That is why Petitioner asked the Commission, and now asks this Court, to reopen the proceedings to allow Petitioner to meet that issue which has now become of paramount importance.

The questions previously decided not being the same, where is the possible conflict? Certainly it cannot be with regard to the question of whether the contract between Petitioner and Intervener is in fact for a fixed rate. As shown above, in the language of the courts themselves, that was not a question decided by them. Further, as this Court states in its opinion, "the Commission had *assumed* this to be such a [fixed rate] contract." (Printed opinion herein, p. 2. Emphasis added.) The reviewing courts therefore had to "judge the propriety of [the Commission's] action solely by the grounds invoked by the [Commission]." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Now, however, that question should and must be decided. And it must be decided by the Commission in the first instance.

> *Cf. The City of Lancaster v. F.P.C.*, ... F.2d ...., (D.C. Cir. Dec. 12, 1957), (F.P.C. having made no finding with respect to a particular contract, the District of Columbia Circuit remanded the case to the Commission to make findings as to whether there was a contract and, if so, what its terms and conditions were.)

See also: Portsmouth Gas Co. v. F.P.C., 247 F.2d 90, 94 (D.C. Cir., 1957).

Nor will this Court be called upon to rule inconsistently with the Supreme Court's mandate. That mandate simply remands the case "for such further proceedings not inconsistent with this opinion as the Commission may deem desirable." Intervener contends this remand was addressed to the Commission's discretion.[9] We agree. The sole question here is whether the Commission abused that discretion in view of all the proceedings *subsequent to the remand.* This is an entirely new question *and an entirely new controversy* not heretofore presented to any Court. It does not call for a determination by this Court which might be inconsistent with the Supreme Court's mandate. It is, moreover, a question which can be decided *without resort to any of the record which was before the District of Columbia Circuit or the Supreme Court but entirely on the record made subsequent to the remand. In fact it could be decided on the*

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[9] "Memorandum In Reply To Petitioner's Memorandum In Opposition To Motion To Dismiss Petition For Lack of Jurisdiction", p. 6.

pleadings and exhibits now before this Court, with the possible addition, only, of Petitioner's submission to the Commission following the remand.

What is it that Petitioner asks here? Petitioner has not merely petitioned this Court to review the Commission's order, it has also petitioned for leave to adduce additional evidence—two separate and distinct reliefs covered by § 313 (b). The relief prayed for is that this Court set aside the Commission order of July 10, 1957, and direct the F.P.C. to reopen Docket No. E-6482 and take further evidence and hold further hearing. The basis for the prayer is that in view of changed circumstances created by the Supreme Court's opinion Petitioner is entitled to a further hearing and to submit further evidence on the issues now made determinative by that opinion but either not considered or not before the Commission in the original proceeding. To determine whether the Commission abused its discretion in refusing to reopen the proceedings all that is necessary is to apply the general law governing the exercise of administrative discretion. That law is clear: " After remand was made, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress." *SEC v. Chenery Corp., supra,* 332 U.S. 194, 200 (1947). The courts have uniformly required reopening of administrative proceedings under circumstances similar to those present in this case. The following cases are illustrative:

1. Jacobsen v. National Labor Relations Board, 120 F.2d 96 (3rd Cir. 1941).

The Board in that case originally assumed that it had jurisdiction because interstate commerce was affected (just as in our case the F.P.C. "assumed" the contract in question was for a fixed rate and assumed that the issue in the case was whether the new rate was "reasonable" under § 205 of the Act.) Later, however, the Board reversed itself and ruled that "the facts * * * are not sufficiently developed to afford a basis for determining whether * * * the operations of the respondent affect commerce * * *," and it dismissed the case.

In view of the reversal by the Board causing a new issue to be determinative in the case (similar to the reversal by the Supreme Court in our case causing new issues to become determinative), the petitioner (as in our case) filed a petition with the Board to reopen the case and to take further testimony on the newly determinative issue. When this was denied (as in our case), he filed a petition with the court of appeals (as we have done here) to set aside the Board's order and to direct the Board to take further testimony on the new issue. The court said:

> "The petitions by which leave was sought to take additional evidence upon this issue are inartistically drawn and, as we have stated, do not set forth the specific testimony relied on.[10] These petitions were presented to the Board only after that tribunal had reversed the position taken by it in its original decision and order, [which in effect held] that * * * the operations * * * did affect commerce. * * * We conclude there was no sufficient reason for the Board to refuse to receive additional testimony upon the issue of interstate commerce *and that its refusal to do so was an abuse of discretion.*" (Emphasis added.)

2. National Labor Relations Board v. Burns, 207 F.2d 434, 436 (8th Cir. 1953).

In this case the NLRB issued a cease and desist order and then applied to the court for enforcement. One issue before the Board had been whether certain union members had applied for jobs in good faith. The respondent employers were denied the right to present certain evidence to support their side of this issue. The NLRB contended that even if the exclusion was error there was no basis for assuming the excluded evidence would have changed the result. The court, quoting from *Donnelly Garment Co. v. NLRB,* 123 F.2d 215, 224 (8th Cir. 1941), held that the employer should have been permitted to present their evidence on this issue:

---

[10] In our case, also, failure to set forth certain specific testimony was a ground relied upon by the Commission in denying the motion to reopen. (See, for example, pp. 7-9, Exhibit A, Petition to Review.)

> " 'That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. * * * That the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point. The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered' * * * What was said in that case was a correct statement of the law."

3. National Labor Relations Board v. Tennessee-Carolina Transportation Co., 226 F.2d 743 (6th Cir. 1955).

In this case, the refusal of the Board to hear evidence offered by the employer on a material issue was held to be a denial of due process and the court remanded the case to the Board for the taking of such evidence.

4. Forrester Box Co. v. Commissioner of Internal Revenue, 123 F.2d 225 (8th Cir. 1941).

This case is an example, like our case here, of a proceeding in which the petitioner sought to submit new evidence in light of a new theory found to be controlling after an earlier theory, on which the proceeding formerly was conducted, was found to be in error. The court said at page 229:

> "It is apparent that the petitioner's evidence was directed toward proving the nonexistence of actual depreciation, and not toward proving the amount of allowable depreciation. The petitioner demonstrated that the respondent's determination was based on an erroneous theory, but it failed to prove, as the Board has pointed out, the amount of depreciation which was allowable from 1922 to 1929 with respect to the machinery and equipment. The Board was of the opinion that a far greater depreciation was allowable than the petitioner had taken. In effect, the Board ruled that, while the respondent's determination, which had been appealed from by the petitioner was based on an utterly untenable theory, the petitioner must accept that determination because of its failure to show that its own theory as to the basis for determining gain on the sale of the machinery and equipment in 1929 was correct.
>
> "It is obvious now that both the respondent and petitioner were shooting wide of the mark in the proceedings before the Board. * * * Under the circumstances, we think that it was the duty of the Board, after it had decided what the proper basis was for determining gain, to afford the petitioner an opportunity to show what the allowable depreciation on the machinery and equipment was * * *"

5. Isbrandtsen Co. v. U.S., 96 F. Supp. 883 (S.D. N.Y. 1951).

In this case Judge Frank states the simple elements of fair play called for in hearings conducted by administrative agencies:

> "The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, *by omitting to inform itself and by acting ignorantly when intelligent action is possible.* * * * (Emphasis added.)

These cases obviously cover part of Petitioner's argument on the merits in support of its Petition to Review herein, but it was felt necessary to set them forth at some length because they show that the determination of the questions presented to this court will not require an examination of the original record before the Commission, will not conflict with the opinions of the courts rendered on appeal from the first Commission order, and will not call for any action by this Court inconsistent with the Supreme Court's remand. Petitioner is merely asking this Court to allow it the measure of due process to which it is entitled in an administrative proceeding. In the face of such a great abuse of due process as is shown by the present case this Court should not shirk its duty. As the Supreme Court said in *U.S. v. Bank of New York & Trust Co.*, 296 U.S. 463, 479 (1936):

> "It is a general rule that the grant of jurisdiction does not, of itself, imply that the jurisdiction is to be exclusive. * * * Upon the state courts, equally with the courts of the Union, *rests the obligation* to guard and enforce every right secured by the Constitution and laws of the United States *whenever those rights are involved in any suit or proceedings before them.*" (Emphasis added.)

Surely, as the cases heretofore cited hold, Petitioner should be allowed a *hearing* to present to the Commission such facts as it has. Particularly is this so when the Commission openly recognizes that the showing already made *indicates a possible adverse effect on the public interest!* The Commission surely cannot be permitted to find that the contract here "may or may not" adversely affect the public interest and then blithely dismiss the proceeding without deciding whether it does or not. (See again Petition to Review, p. 9.) Petitioner and the public have the right to have the Commission bring its expert judgment to bear on the facts and make findings. It is a clear abuse of discretion for the Commission to refuse to hear the pertinent evidence and not inform itself of the facts so that it may determine whether the public interest is or is not being adversely affected.

Again, the foregoing covers a portion of the argument Petitioner would make on the merits in support of its Petition to Review, but Petitioner sincerely believes that it is necessary to do so in order to show that the Court is only concerned with issues arising subsequent to the remand. The record which would be needed to decide those issues would be the record which is before this Court now in the form of exhibits, except for Petitioner's submission to the Commission following the Supreme Court's remand. It would not be the record which was before the District of Columbia Circuit.

IV. In the Interest of Justice This Court Should Not Dismiss the Petition but Should, if It Finds It Has No Jurisdiction, Transfer the Cause to the District of Columbia Circuit.

Should this Court remain unconvinced that it has both jurisdiction and venue to hear the petition to review, it should, under any concept of justice, transfer the proceedings to the District of Columbia Circuit. The cases of *Columbia Oil & Gasoline Corp. v. S.E.C.*, 134 F.2d 265 (3d Cir. 1943), *L. J. Marquis & Co. v. S.E.C.*, 134 F.2d 335 (2d Cir. 1943) and *L. J. Marquis & Co. v. S.E.C.*, 134 F.2d 822 (3d Cir. 1943) show that this Court has the power to do so. In *American Power Co. v. S.E.C.*, 325 U.S. 385, 391 (1945), the Supreme Court noted with approval the procedure adopted in those cases. Simple justice and equity commend it as the appropriate course. If such course is not followed Petitioner will be deprived of its substantial right to review by the merest of technicalities.

Intervener, in the affidavit of William C. Chanler attached to its "Memorandum In Reply To Petitioner's Memorandum In Opposition to Motion To Dismiss Petition For Lack of Jurisdiction," agrees with us that "if either this Court or the Court of Appeals for the District of Columbia Circuit should deem that equity required that P.G. & E. be permitted to present its petition to review before the [District of Columbia Circuit] even though the time to file such petition has expired, this could be accomplished by a transfer * * *" Mr. Chanler does state that if such were done he would ask the District of Columbia Circuit to dismiss the petition as frivolous. Petitioner would of course meet that charge, when and if made, before the District of Columbia Court. However, the cases cited under Section III hereof should suffice to show that the Petition to Review is far from frivolous and, indeed, presents a case of callous refusal by the Commission to correct mistakes made by it in the first instance, to grant Petitioner the hearing required by due process and fair play, and to determine issues affecting the public interest.

The Commission, in its motion supporting Intervener's motion to dismiss, suggests that the above cited cases may be inapplicable here because they were cases where petitions were filed simultaneously in two circuits. Of course, as we have heretofore argued, Petitioner believes that that is the only situation to which the exclusive jurisdiction provision of § 313(b) was meant to apply. However, if this Court reaffirms its present holding that exclusive jurisdiction lies with the District of Columbia Circuit, the position of the Commission would be anomalous indeed. It would be urging, on the one hand, that this Court does not have jurisdiction because exclusive jurisdiction is in another circuit and then arguing, on the other hand, that this Court cannot transfer because the other circuit does *not* have jurisdiction.

The only argument the Commission might make in support of its position might be that while the other circuit (District of Columbia) has exclusive jurisdiction it cannot now be timely invoked. But an examination of the cited cases show such argument would be without merit when applied to a transfer. In *Columbia Oil & Gasoline Corp. v. S.E.C., supra,* 134 F.2d 265 (3d Cir. 1943) the petitioners, as aggrieved parties, had previously filed a petition to review an S.E.C. order in the Second Circuit. Other aggrieved parties had petitioned for review in the Third Circuit, which subsequently obtained exclusive jurisdiction because the S.E.C. transcript ultimately was filed there. The Second Circuit had dismissed the petition before it and denied a motion for rehearing "without prejudice to the right of petitioners to renew said motion in the event that the Circuit Court of Appeals for the Third Circuit should not entertain jurisdiction of the instant petition to review." Petitioners had then sought to file their petition in the Third Circuit which declined to take it *because the sixty day period in which the petition could be filed had expired.* The petitioners then returned to the Second Circuit and obtained an order transferring the petition which had been filed there to the Third Circuit. (*L. J. Marquis & Co. v. S.E.C., supra,* 134 F.2d 335 (2d Cir. 1943).) The Third Circuit then heard that petition and rendered its decision. (*L. J. Marquis & Co. v. S.E.C., supra,* 134 F.2d 823 (3rd Cir. 1943).) This is the line of procedure referred to with approval by the Supreme Court in *American Power Co. v. S.E.C., supra,* 325 U.S. 385, 391 (1944).

It is clear therefore that the fact that Petitioner could not now *initiate* a review in the District of Columbia Circuit does not prevent this Court from *transferring* and that, to afford Petitioner an opportunity for a hearing, this Court should do so.

V. The Importance of the Question Here Decided on the Conduct of Appeals from Many Administrative Agencies Warrants Either a Rehearing En Banc or Certification of the Question to the Supreme Court.

It is axiomatic that procedural law, of all law, should be clear and definitive, entirely free from vague standards of meaning. By its present opinion this Court casts doubt upon what heretofore was a clear venue provision in the Federal Power Act. Venue is now to depend, not upon the clear language of the statute, but upon a determination of whether there exists "the hazard of confusing or unseemly discord between two courts of appeal" if the venue provision of the statute is followed.

Not only does this ruling of the Court cast doubt on the application of the express venue provisions of § 313(b) of the Federal Power Act, but it also casts the same doubt on the application of similar provisions in other regulatory statutes containing the same or similar venue provisions. For example, venue provisions indentical to § 313(b) are found in the Civil Aeronautics Act (49 U.S.C. § 646(a)), the National Labor Relations Act (29 U.S.C. § 160(f)), the Holding Company Act (15 U.S.C. § 79x(a)), and the Securities Exchange Act (15 U.S.C. § 78y(a)). Similar provisions are found in the Federal Trade Commission Act (15 U.S.C. § 45(c)) and the Securities Act (15 U.S.C. § 77i(a)).

It takes but a moment's reflection to realize that administrative proceedings often involve numerous parties widely spread throughout the country, that the subject matter dealt with by the agencies often exists for a long period (as does the contract here), and that, therefore, a number of orders relating to different phases of the subject matter may be issued by the administrative agency from time to time over a course of years. Accordingly, it is commonplace that these orders are reviewed from time to time over the years by different courts of appeal in the various circuits. To make the venue to review such orders depend upon the vague standard of whether there exists a "hazard of confusing or unseemly discord between two courts of appeal" dealing with the same subject matter is to create a rule of venue that is impossible of application. It can only lead to such doubt that there will be a complete frustration of the salutary purpose of the venue provisions—that of giving the aggrieved party his free choice of a convenient forum, so he need not seek redress in a court thousands of miles away. (See again, 53 Harv. L. Rev. 332 (1949).)

The results of such a rule as this Court would establish can be seen when applied to the situation here before it. If this Court does not mean to hold that for the next thirteen years the jurisdiction to review subsequent orders of the Commission relating to the contract here is vested in the District of Columbia Circuit, where is the line to be drawn? How can the parties be sure which circuit will have jurisdiction in the future? Must they guess at their peril in each instance whether there exists "the hazard of confusing or unseemly discord between two courts of appeal"?

Petitioner respectfully suggests that the importance of providing for orderly administration of the various important acts herein cited and the need for protecting aggrieved parties from being forced either to abandon their right to a convenient forum or to select that forum at the risk of losing substantial rights because of a procedural technicality if they guess wrong, warrant this Court not only in granting a rehearing but also, if it is in doubt as to the correctness of its interpretation of § 313(b) in view of the authorities and policies herein cited, to either grant a rehearing en banc or certify to the Supreme Court the question or questions which it may have.

CONCLUSION

Petitioner respectfully prays that this Court grant a rehearing and that upon such rehearing this Court either (1) take jurisdiction of Petitioner's Petition For Review and To Take Further Evidence, (2) transfer said Petition to the District of Columbia Circuit, (3) grant a rehearing en banc, or (4) certify the jurisdiction and venue questions to the Supreme Court.

Respectfully submitted,

F. T. SEARLS
FREDERICK W. MIELKE, JR.
MALCOLM A. MACKILLOP
Attorneys for Petitioner

I, MALCOLM A. MACKILLOP, one of the attorneys for Petitioner, an attorney regularly admitted to practice in the United States Circuit Court of Appeals for the Ninth Circuit, do certify that in my opinion the foregoing petition for rehearing in the case of *Pacific Gas and Electric Company v. Federal Power Commission, Sierra Pacific Power Company,* Intervener, No. 15,773, is well founded and is not presented for the purpose of creating a delay.

MALCOLM A. MACKILLOP

Dated: March 14, 1958.

Certificate of Service

I hereby certify that I have this day served copies of the attached Petition for rehearing, together with a copy of this Certificate, upon the Respondent and the Intervener herein, by mailing copies thereof addressed to:

Howard E. Wahrenbrock, Esq.,
Federal Power Commission,
441 G Street, N. W.,
Washington 25, D.C.

William C. Chanler, Esq.,
Winthrop, Stimson, Putnam & Roberts,
40 Wall Street,
New York 5, New York

Gregory A. Harrison, Esq.,
Brobeck, Phelger & Harrison,
111 Sutter Street,
San Francisco 4, California

March 14, 1958.

Malcolm A. MacKillop
Attorney for
Pacific Gas and Electric Company

PETITION FOR REHEARING

In the

United States Court of Appeals

for the

District of Columbia Circuit

No. 14,422

Pacific Gas and Electric Company, *Petitioner,*

vs.

Federal Power Commission, *Respondent.*

Sierra Pacific Power Company, *Intervener.*

F. T. Searls
245 Market Street
San Francisco 6, California

Robert E. May
1700 K Street, N.W.
Washington 6, D.C.

Attorneys for Petitioner

Of Counsel:
Frederick W. Mielke, Jr.
Malcolm A. MacKillop
Roger J. Nichols
245 Market Street
San Francisco 6, California

May, Shannon and Morley
1700 K Street, N.W.
Washington 6, D.C.

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY 28 1959

Joseph W. Stewart
CLERK

PARKER PRINTING COMPANY, 150 FIRST STREET, SAN FRANCISCO 5

In the

United States Court of Appeals

for the

District of Columbia Circuit

No. 14,422

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner*,

vs.

FEDERAL POWER COMMISSION, *Respondent*.

SIERRA PACIFIC POWER COMPANY, *Intervener*.

PETITION FOR REHEARING

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Petitioner, Pacific Gas and Electric Company, petitions for a rehearing upon the following grounds:

I.

THE COURT HAS MISSTATED THE FACTS

In its per curiam opinion the Court has misstated the facts in two important respects.

In the opening paragraph of its opinion, the Court makes the following statement:

> "In 1953 Pacific sought unilaterally to abrogate this contract by filing a proposed schedule of increased rates, under § 205 of the Federal Power Act."

There is no finding which supports this statement as to abrogation. The evidence as to the nature of the contract is in sharp dispute, and the dispute has never been resolved by the Commission. Thus, there has never been any finding as to whether the Sierra contract is in fact one for a fixed or changeable rate. At the oral argument in the instant matter, as the Court will recall, neither of the opposing counsel could point to any such finding. In fact, under questioning by Judge Bazelon, counsel for the Commission openly conceded that there has never been a finding on this issue.

This Court's statement that Pacific sought to "abrogate" the contract is, therefore, clearly erroneous. The statement begs the very question involved. Obviously, if the parties agreed to a changeable rate, Pacific was not seeking to "abrogate" the contract when it sought to change the rate.

Also, in the opening paragraph, the Court makes this statement:

> "Notwithstanding the absence of any provision in the rate contract for increases during its term, the Commission approved the new rates * * *"

This statement as to absence of any provision for change in the contract overlooks paragraph 12 of the contract under which the parties agreed that the rate could be changed at any time by the California Commission. (See our opening brief, pp. 11-12, note 7, and closing brief, pp. 3-4.) Indeed, is it conceivable that any utility would enter into a contract running as long as 30 years without some provision in the contract for a change in the rate?[1] Under California law, for which the parties contracted, it is beyond dispute that paragraph 12 in the contract rendered the contract a changeable rate contract. (See closing brief, p. 4 note 4, Appendix II.) This Court, therefore, is clearly in error in stating that there was an "absence of any provision in the rate contract[2] for increases".

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[1] At oral argument counsel for Sierra suggested to the Court that Pacific expected costs to decline after the contract was executed and that this was the reason Pacific agreed to a "fixed" rate for the Sierra contract. The implication is that Pacific was expecting to make a handsome profit because costs would go down while the rate would remain firm. The implication is false. If Pacific's profit on the Sierra service ever rose above a "fair" return, the rate would be lowered by the Commission (*South Carolina Generating Co. v. F.P.C.*, 249 Fed. 2d 755, 761-762 (4th Cir. 1957), *cert. denied* 356 U.S. 912; and see argument to this effect by Pacific at the original Commission hearing (Supp. App. R. 2250)).

[2] The use of the term "rate contract" by the Court is itself confusing. It suggests that the dominant purpose of the Sierra contract was to fix a rate. This is misleading. The contract was entered because a long term service had to be agreed upon in order to amortize the investment necessary to provide the service. We know of no industry today (let alone the utility industry which has a ceiling on earnings and therefore cannot charge high prices initially to cover future unknown contingencies) that will enter into a long term service or supply contract at a "fixed" price or rate without some provision in the contract for adjustment in the price, either by arbitration, by tying into a labor index, price index, or the like. In the case of California utility contracts, this price adjustment protection is afforded by a clause in the contracts which states that the contracts are subject to change by the California Public Utilities Commission. The clause is, in fact, a requirement of the California Commission (Supp. App. R. 2256-2257). This is the clause which appears in paragraph 12 of the Sierra contract.

II.

THE POINTS OF LAW RAISED IN SUPPORT OF THE CONTRACT ISSUE ARE NOT ANSWERED

Traditionally, a per curiam opinion is written in cases which involve disputes over "obvious applications of settled rules of law" (*Newmons v. Lake Worth Drainage Dist.,* 87 So. 2d 49, 50 (Fla. 1956)).

Such is hardly the case here. Nowhere in the briefs of the respondent or intervener is there any citation of authority that differs from the abundant authority as to "law of the case", "res judicata", and scope of review cited in our opening brief. (See opening brief, pp. 25-40.) Indeed, at the oral argument counsel for respondent openly acknowledged that he could find no support for his position in these accepted doctrines. Instead, he suggested that some vague doctrine, which he sought to label as "waiver", "acquiescence", or "estoppel", should be invoked. Yet he could point to no authority—let alone any "settled" authority—in support of his position. Nor did this Court, in extended questioning of petitioner's counsel, suggest any line of "settled" authority that ran counter to the settled doctrines of "law of the case", "res judicata", and scope of review relied upon by petitioner. If there is some legal reasoning by which we are to be deprived of a determination of the trier of fact as to whether the parties in fact agreed to a fixed-rate contract, we are not told by this Court what that reasoning is.

III.

THE POINTS OF LAW RAISED IN SUPPORT OF THE § 206 ISSUE ARE NOT ANSWERED

What we have said with respect to "settled" authority in our favor on the contract issue applies equally to our position on the second issue raised in our opening brief, the

§ 206 issue. The Commission's brief acknowledges that the Commission's order requires that the out-of-pocket loss on the jurisdictional Sierra service be paid by revenues derived from non-jurisdictional intrastate service. This is contrary to law, according to accepted doctrine. (See closing brief, pp. 12-14.) Yet this Court has affirmed the Commission's action without reference to any authority and without indicating what reasoning the Court has followed.

The use of a per curiam opinion in the present instance certainly cannot be justified on the ground that "anything written on the points raised would add nothing to the law" (*Newmons v. Lake Worth Drainage Dist., supra,* 87 So. 2d 49, 51 (Fla. 1956)). The present case involves the interrelationship between § 205 and § 206 of the Federal Power Act (and, unavoidably, between the similar sections of the Natural Gas Act, § 4 and § 5). There is a paucity of law on this subject.

The *Mobile*[3] and *Sierra*[4] cases were landmark decisions. As Sierra's counsel has said, the cases were "plowing virgin soil."[5] Until these cases were decided, the gas and electric utility industry had thought that neither § 5 of the Natural Gas Act nor § 206 of the Federal Power Act could be used by selling utilities to obtain rate relief, because § 4 and § 205, it was thought, were exclusively applicable to them. It was also believed that the standard of a "reasonable rate" was exactly the same under any of these sections. All this was changed by the *Mobile* and *Sierra* decisions. If a fixed-rate service contract is involved, said the Supreme Court in *Sierra*, then the standard of reasonableness to be applied under § 206 is different from that under § 205. The standard under § 206, said the Court, is "whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, *or be unduly discriminatory*". (Emphasis ours.)

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[3] United Gas Pipe Line Co. v. Mobile Gas Service Corp. 350 U.S. 332 (1956).

[4] F.P.C. v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

[5] Sierra's brief, p. 19.

Pacific contends that the present rate to Sierra is "unduly discriminatory" under this new test laid down by the Supreme Court for § 206. In support of its position, it has pointed out that the Commission's order allows the rate to Sierra to be approximately 22% below the rate which the Commission has fixed for Pacific's only other interstate customer, even though the Commission has found that the cost of serving this other customer is approximately 15% less than the cost of serving Sierra. In other words, the Commission's order permits a rate differential of some *thirty-seven percent* between Pacific's only two jurisdictional customers.

The case is one of first impression under the new § 206 standard. The question is whether a showing of a rate discrimination as high as 37% makes out a prima facie case of "undue discrimination" under the standard laid down by the Supreme Court for § 206 of the Federal Power Act and § 5 of the Natural Gas Act.

These circumstances show that this is not a case where "anything written" on the issue raised "would add nothing to the law". Just the opposite is true. Anything written would add greatly to the law. Very little has yet been decided by the courts as to the meaning of the § 206 standard. Obviously, anything said by this Court would help considerably in guiding the course of other cases involving the § 206 (or § 5) standard.

To illustrate the importance of having a court decision on the meaning of the § 206 standard in the present case, we need merely refer to the Phillips Petroleum Company case now before the Federal Power Commission, where a decision on this very standard has just been rendered by the Presiding Examiner under § 5 of the Natural Gas Act. The decision is revealing. It shows that the Commission Staff has there argued (as we do here) that under § 5 of the Natural Gas Act (corresponding to § 206 of the Federal Power Act, involved here), the Commission can and should modify contract rates so as to:

(1) "permit Phillips opportunity to obtain revenues from *jurisdictional sales* sufficient to meet its *jurisdictional cost of service*" (emphasis added)

and

(2) "eliminate undue discrimination".

With respect to "undue discrimination", the Staff has argued that the mere existence of different rates in different jurisdictional sales contracts shows "undue discrimination".[6]

The Presiding Examiner has accepted all these contentions. Yet, under the present per curiam opinion, the contentions would seem invalid. Obviously, a discussion by this Court of the meaning of the § 206 standard would add greatly to the law on the subject.

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[6] "The Staff's reply brief strongly disagrees with this position, contending that the Phillips contract rates vary so widely, even as between contracts for the same service from the same producing areas, as to patently contravene the public interest, generating and perpetuating undue preference and undue discrimination; that this results in a rate structure completely adverse to the very principles and purposes of the Natural Gas Act; that the *Sierra Pacific* decision, *supra,* clearly recognizes the power of the Commission under Sec. 5(a) to modify contract rates in order to eliminate undue discrimination or preference; that accordingly the Examiner and the Commission should modify Phillips' contract rates in such a way as to eliminate such undue discrimination and preference, and that such modification when effected should permit Phillips opportunity to obtain revenues from jurisdictional sales sufficient to meet its jurisdictional cost of service as determined in this proceeding." Decision, *In the Matters of Phillips Petroleum Company, et al.*, Docket Nos. 6-1148 *et al.* (Issued April 6, 1959), p. 26.

IV.

SIMPLE FAIRNESS REQUIRES THAT THE REASONS FOR THE COURT'S DECISION BE STATED

When we prevailed before the Commission originally, we prevailed upon the basis of the law as both the utility industry and the Commission had always understood it to be. This concept of the law was changed by the Supreme Court. The case was then sent back to the Commission for reconsideration under what has in effect become new law.

Under this new law, we asked the Commission to consider two points. First, we asked the Commission to find whether the contract provided for a changeable rate because, if it did, the existing record could be used to determine whether the new law authorized a rate increase. Second, if the Commission found the contract to be for a fixed rate, we asked the Commission to determine according to the new law whether the existing rate was unlawful under § 206 of the Federal Power Act.

Instead of considering the case anew and deciding it in the light of the new law announced by the Supreme Court, the Commission declined to consider the case further. It did not decide whether the contract involved was in fact one for a fixed rate, even though this issue was critical under the new law. And it did not decide whether the existing rate was unlawful, even though this issue too was critical under the new law. Instead, it terminated the rate case without making any findings on these issues.

We now have the per curiam opinion of this Court in which it merely states that it will not disturb the Commissions action. But why not disturb it? Why should there not be findings made on the issues which have now become determinative under the new law? Why is Pacific not entitled to rate relief under the new law? Why are we not correct in our views of the Commission's functions and duties under the new law? The Commission has never answered these questions. And now all we have from this Court is silence.

We submit that simple fairness, as well as the need for a meaningful review in this case, requires that this Court state the reasons for its decision.

SUMMARY AND CONCLUSION

The Court's per curiam opinion has misstated the facts in two important respects. It has also disposed of important and seemingly irrefutable points of law without discussion. The issuance of a per curiam opinion, without any indication of the basis of the Court's decision, either by way of reference to authority or by way of legal reasoning, appears wholly unwarranted in this case. If we are wrong in our position at any point, we should be told wherein we are wrong.

A rehearing should be granted. If a rehearing is not granted, then an opinion should be written which will correct the misstatements of fact and which will indicate the basis for the rejection of the legal points relied on by petitioner.

Respectfully submitted,

F. T. Searls
245 Market Street
San Francisco 6, California

Robert E. May
1700 K Street, N.W.
Washington 6, D.C.

Attorneys for Petitioner

Of Counsel:

Frederick W. Mielke, Jr.
Malcolm A. MacKillop
Roger J. Nichols
245 Market Street
San Francisco 6, California

May, Shannon and Morley
1700 K Street, N.W.
Washington 6, D.C.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,422

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent,

SIERRA PACIFIC POWER COMPANY,

Intervener.

CERTIFICATE OF GOOD FAITH

Pursuant to Rule 26 of this Court, I hereby certify that the accompanying Petition for Rehearing is presented in good faith and not for delay.

F. T. SEARLS